Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1992

ROBINS ISLAND PRESERVATION FUND, INC.,
Petitioner,

v.

SOUTHOLD DEVELOPMENT CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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October 5, 1992

Questions Presented For Review

The American Revolution ended with the concluding of the 1783 Treaty of Peace between the United States and Great Britain. Article 6 of the treaty prohibits "future confiscations". Article 5, paragraph 2, stipulates that "all persons who have any interest in confiscated lands, whether by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights."

The questions presented are:

1. Whether, under the Supremacy Clause, any law other than the Constitution, a federal statute, or subsequent treaty can abrogate or bar the enforceability of Article 5, paragraph 2, and Article 6 of the 1783 Treaty of Peace, and Article 9 of the Jay Treaty.

2. Whether, consistent with the separation of powers doctrine, a period of limitation can be judicially implied in these 1783 and 1794 treaty provisions when neither the language nor history of the treaty provide a basis for this limitation.

3. Whether New York's seizure and sale of Robins Island in 1784 violated property rights secured under Article 5, paragraph 2, and Article 6 of the 1783 Treaty of Peace and under Article 9 of the 1794 Jay Treaty.

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Petitioner, Robins Island Preservation Fund Inc., respectfully prays that Writ of Certiorari be granted to review the judgment and opinion of the the United States Court of Appeals for the Second Circuit, entered in this case on March 23, 1992.[1]

Opinions Below

The opinion of the court of appeals (APP 1-37) is reported at 959 F.2d 409 (2nd Cir. 1992). The

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[1] Petitioner corporation has no parent or subsidiaries.

opinion of the district court (APP 39-76) is reported at 755 F. Supp. 1185 (E.D.N.Y. 1991).

Abbreviations Used In This Petition

"APP" refers to the appendix.

"C.R." refers to the Clerk's Record entries.

Jurisdiction

The judgment of the court of appeals was entered on March 23, 1992, and the petition for rehearing was denied on June 15, 1992. (APP 79) The time within which to file the petition for writ of certiorari was extended to and including October 5, 1992, by order of Justice Thomas entered on August 3, 1992. (APP 77). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the district court below was invoked under 28 U.S.C. secs. 1331, 1332, and 1343(3).

Constitutional, Treaty and Statutory Provisions Involved

1. United States Constitution, Supremacy Clause, Article VI, cl. 2.

2. 1783 Treaty of Peace, 8 Stat. 54 and 80. (selected provisions)

3. 1794 Jay Treaty, Article 9, 8 Stat. 116.

4. 1779 New York Act of Attainder, Laws of New York, 3 Sess., c. 25. (selected provisions)

5. 1782 Act to Abolish Entails, Laws of New York, 6 Sess., c. 2, sec. 1.

6. Act of February 20, 1790, Laws of New York, 13 Sess., c. 10.

7. 1796 Virginia Act of Compromise, Laws of Virginia, c. 14 (1796).

8. Act of April 5, 1832, Laws of New York, 55 Sess., c. 86, sec. 1.

Due to their length, the constitutional, treaty, and statutory provisions involved are set out in the Appendix (APP 81-99).

Statement of the Case

Robins Island is a 445-acre island in the Peconic Bay of Long Island. It is the only island of its size and proximity to New York City that has remained virtually unchanged since time immemorial.

Petitioner claims an ownership interest in the island adverse to respondent. Petitioner bases its

ownership interest on the allegation that New York, in violation of the 1783 Treaty of Peace, confiscated this island from petitioner's predecessor in interest. Ending the American Revolution, the 1783 Treaty of Peace between the United States and Great Britain included among its provisions guarantees relating to specified property interests in the United States and the prosecution of those interests.

Petitioner also alleges that its 1783 Treaty claim is protected by Article 9 of the 1794 Jay Treaty. APP 87. Petitioner further asserts that no treaty or law since 1783 has extinguished or limited the right to enforce its claim arising out of either of these treaties.

Respondent has been the record owner of the island since 1979. It claims ownership of this island based on an original conveyance from the State of New York to respondent's predecessors in interest. The New York conveyance was predicated on a 1779 attainder law in which New York purported to confiscate the property interest in the island held by

petitioner's predecessor in interest. The material facts are as follows.

In 1734, Joseph Wickham devised Robins Island to his "Son Joseph Wickham and to the male heirs of his body lawfully begotten or to be begotten forever." APP 4. This devise to the "male heirs of his body" created an estate tail, or fee tail. Consequent to this entailing instrument, Joseph Wickham II held Robins Island as tenant in tail, and Joseph Wickham II's oldest son Parker Wickham, and Parker Wickham's oldest son Joseph Parker Wickham, each in turn became entailed, by inheritance from Joseph Wickham I, with an interest in Robins Island. This interest was held even while the predecessor prescribed under the will continued in possession of the same estate as tenant in tail. APP 20-21.

Upon the death of Joseph Wickham II in 1749, Parker Wickham obtained possession of Robins Island as tenant in tail.

In 1779, during the Revolutionary War and the British occupation of Long Island, APP 5, 41-42, New

York passed an Act of Attainder which "convicted and attainted" Parker Wickham without trial for the crime of adhering to the enemies of the State of New York. Under this Act, his real and personal estate were declared forfeited to and vested in the State, and he was declared "to be forever banished from this State." APP 31. Despite this Act, the State did not thereby obtain possession or actual seisin of Robins Island because of the British occupation. APP 27.

At the time of the Act of Attainder, New York claimed Vermont as its territory. Yet neither there nor in British-held New York City and Long Island was New York able to enforce this or any of its laws or exercise any powers of government. Thus, despite the Act, Parker Wickham remained in possession of Robins Island, residing in a territory outside New York's jurisdiction. Upon the evacuation of the British army from Long Island in November 1783, Wickham moved to Connecticut and died there in 1785.

No act of the State of New York ever attainted or convicted Wickham's son Joseph Parker Wickham,

and he retained his entailed interest in Robins Island before and after the Act of Attainder. APP 22.

In July 1782, the State of New York passed a law abolishing estates tail. APP 92. Upon enactment, this law converted fee tail estates in possession and fee tail freehold interests into fee simple estates and interests. APP 28 and 92. Despite this law, the British occupation continued to prevent New York from obtaining possession or actual seisin of Robins Island. APP 27.

In November 1782, the United States and Great Britain entered into a Provisional Treaty of Peace, which went into effect in January 1783. Articles 4, 5, and 6 of this treaty protected, among others, the property interests in the United States of American loyalists, their heirs, assigns, and successors in interest. APP 83-85. Specifically, Article 5, para. 2, provided any person having an interest in confiscated lands with the right to prosecute his claim, unobstructed by otherwise lawful impediments. Article 6 prohibited any future confiscations. No language of

the treaty limited the time for bringing an action to secure rights protected under these articles. APP 30-33.

On September 3, 1783, the United States entered into a Definitive Treaty of Peace with Great Britain. Articles 4, 5 and 6 of this Treaty were identical to the corresponding articles of the Provisional Treaty.[2] The Definitive Treaty also did not limit the time for bringing Article 5, para. 2, or Article 6 actions, APP 30-33, nor has any subsequent treaty or statute imposed such a limit. *Id.*

British forces relinquished control of Long Island in November 1783. APP 8, 12.

Pursuant to the New York Speedy Sales Act of 1784, Commissioners of Forfeiture purported to convey Robins Island to purchasers in fee simple, with

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[2] The Provisional Treaty of Peace of November 30, 1782, 8 Stat. 54, did not go into effect until a general peace agreement between Great Britain and France was concluded on January 20, 1783. The Provisional Treaty was ratified and proclaimed by Congress on April 15, 1783. The Definitive Treaty of Peace, 8 Stat. 80, was concluded on September 3, 1783.

For purposes of convenience, all citations in this brief to the Provisional and Definitive Treaties will refer to the "1783 Treaty of Peace."

warranty of title. The state's deed of conveyance of August 5, 1784, describes Robins Island as "forfeited to the People of this State by the Attainder of Parker Wickham." APP 12, 44.

New York did not condemn Joseph Parker Wickham's interest in Robins Island, nor did it compensate him for taking his entailed interest. In order to ameliorate the economic hardship created by this property loss, the British government, in 1789, provided statutorily authorized financial relief to Joseph. This relief was in addition to the British government's offer under the statute to assist in the recovery of property confiscated in violation of the treaty. 23 Geo. III, c. 80, sec. 1, C.R. 47, Ex. 11. Joseph Parker Wickham died in 1806 in Southold, Long Island. APP 12.

In 1794, the United States and Great Britain concluded the Jay Treaty. The treaty was necessary because of repeated violations of Articles 4, 5, and 6 of the 1783 Treaty of Peace. APP 10, 31-32. Article 9 of the Jay Treaty protected property rights secured

under the 1783 treaty. As with the 1783 compact, the Jay Treaty also did not provide a time limitation for bringing actions arising under Article 9.

District Court Findings

The district court found that "the proposition that an act taken by a state after July of 1776 was an act taken by a sovereign and independent government" "outweighed" the argument that New York's 1779 Act of Attainder, upon enactment, had no lawful effect on Parker Wickham's interest in Robins Island because of British dominion over Long Island. APP 50. The court noted, as well, that language in Article 5, paragraph 1, of the treaty "appears" to have recognized the valid confiscation of property in British-held territory in that the location of property recommended to be restored to persons then resident in such territory is not specified. APP 53.

Furthermore, the district court found that whether the 1779 Act of Attainder took a fee simple or fee tail property interest from Parker Wickham, any surviving interest in Joseph Parker Wickham was

extinguished by the 1782 Act to Abolish Entails. APP 56.

The court thereupon concluded that neither Parker Wickham nor his son had a subsisting interest in Robins Island at the time of the treaty and that the treaty consequently had bearing neither on their extinguished interest nor on the claim of their successor-in-interest, the petitioner. Based on that conclusion, it found that petitioner did not have a direct cause of action stemming from New York State's violation of the 1783 Treaty of Peace, and that therefore the application of New York's time-bar law was proper. APP 60. Even, however, were petitioner to have a valid cause of action, the court was unpersuaded that a state-law time bar could not be applied to this action. APP 64.

Appellate Court Findings

The appellate panel also held that New York's 1779 Act of Attainder, upon enactment, had jurisdictional operation in British-held Long Island. APP 16. Like the district court, it supported this

conclusion by primarily relying on decisions of this Court treating the Act as valid in regions not under British dominion, where New York law could be enforced. (Petitioner does not and never has questioned the validity of the Act in areas under New York control.) As regards the subject of the Act's validity in territory not under New York's control, however, neither the court nor the precedents it relied on examined this issue. Consequently, the appellate court did not address a critical argument presented by petitioner, namely, that New York lacked the sovereignty and jurisdiction to enforce its Attainder Act in territory under British rule prior to the treaty. Rather, it simply assumed without discussion that prior to the treaty Parker Wickham's "property rights [were] affected by New York's Act of Attainder. . . ." APP 16.

The panel found that Joseph Parker Wickham's entailed interest in Robins Island continued after the 1779 Act of Attainder, APP 22, but that New York qualified as "first taker", APP 29, and therefore its entailed interest was enlarged into a fee simple under

the 1782 Act to Abolish Entails, while Joseph's was simultaneously extinguished by that Act. APP 27, 29.

The court based its first taker finding on the premise that New York was not a remainderman. APP 29. The Act of Attainder had given the state not an expectancy of possession but "full ownership [of Robins Island] in fee tail", APP 23, "absolutely and immediately", exactly as Parker Wickham had had. APP 22. This meant that the state had "stepped into Parker Wickham's shoes. . . ." APP 23-24. It had become "the tenant in tail who had possession of the land. . . .", APP 26, even though neither the 1779 Act of Attainder nor the 1782 Act to Abolish Entails had given New York "actual physical possession" or "actual or constructive possession", APP 26-27, of the island.

Moreover, what New York was seized of as a result of the Act of Attainder was an estate tail in Robins Island, APP 27, even though an estate tail is a "gift or devise of real property to a man 'and the heirs of his body'", APP 20, and even though the entailed

heir in this case was Joseph Parker Wickham, the offspring of Parker Wickham's body.

In addition, the appellate panel held that petitioner's claim was barred "as untimely" and also barred by the doctrine of laches. APP 34. The panel based this conclusion on what it stated to be the absence of supporting evidence "that a cause of action was preserved in perpetuity by either the Treaty of 1783, or the Jay Treaty of 1794. . . ." APP 33. The panel reasoned that the intent of the 1783 Treaty was not to create "a right of action that would survive the inaction of the aggrieved parties and their heirs over a period of centuries." APP 30. Rather, the intent was "to remove those state-created obstacles, targeted at loyalists and British subjects, which prevented these individuals from having a fair opportunity to present their claims for restitution." APP 31.

REASONS FOR GRANTING THE WRIT

The pivotal issue in this case is whether a treaty can be altered by judicial decision to incorporate a time bar in order to satisfy a bias against unsettling a 200-year-old chain of title.

A closely related issue is whether the 1783 Treaty of Peace prohibition against future confiscations can be circumvented by holding that a confiscation under New York law occurred prior to the treaty in a jurisdiction then wholly outside the governmental limits of New York.

1. By Fashioning A Time Bar To Defeat A Property Right Secured Under The 1783 Treaty Of Peace, The Courts Below Have Violated The Supremacy Clause Requirement That Treaty Provisions And The Binding Obligation To Enforce Them Can Be Abrogated Only By A Subsequent Treaty Or Federal Statute

Reluctant as some courts may be to enforce a treaty whose provisions were drawn up in an age fundamentally different from our own, it is not in their discretion to withhold enforcement. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463,

1475 (D.D.C. 1985) ("While American courts may be justifiably frustrated with the anachronism which the treaty limitation has become, it is not within the province of the judiciary to alter the *quid pro quo* agreed to by the political branches"), *aff'd.*, 829 F.2d 1171 (D.C.Cir. 1987), *aff'd. sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

Under the Constitution's Supremacy Clause (Article 6, clause 2) treaties and federal statutes stand on equal footing as supreme law of the land. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). This equation has resulted in the last-in-time rule. A subsequent treaty will supersede a previously enacted federal statute relating to identical subject matter; and an act of Congress will supersede a previously concluded federal treaty, but only if explicitly intended to do so. *Menominee Tribe v. United States*, 391 U.S. 404, 411 (1968); *Cook v. United States*, 288 U.S. 102, 120 (1933). *Accord*, 1 *Restatement of the Law (Third) of Foreign Relations Law of the United States* (1987), §115, p. 64.

Although the 1783 Treaty of Peace was concluded before the adoption of the Constitution, the supremacy clause assigns it the same legal paramountcy as treaties concluded after the Constitution. *Ware v. Hylton,* 3 U.S. (3 Dall.) 199, 237 (1796). In fact, the words of Article 6, clause 2, "all treaties made . . . under the authority of the United States . . ." were inserted into the Constitution precisely "so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect." *Reid v. Covert,* 354 U.S. 1, 16-17 (1956) (citations omitted). Since, therefore, the 1783 Treaty is part of the supreme law of the land, it is currently as binding on the courts as a treaty concluded yesterday. And just as with a recently concluded treaty -- if any state law defenses could impede the enforcement of rights arising under it, it would not be the supreme law of the land -- the same is no less true of the 1783 Treaty of Peace. "Whenever a right grows out of, or is protected

by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected." *Owings* v. *Norwood's Lessee* , 9 U.S. (5 Cranch) 344, 348 (1809) (per Marshall, C. J., addressing the issue of an Article 5, para. 2, right under the 1783 Treaty).

While the law is settled that a later treaty or federal statute can abrogate prior treaty provisions or bar their enforceability, this Court has never addressed the question whether, consistent with the Supremacy Clause, any law other than a subsequent treaty or federal statute can do likewise.[3] In recognizing that the 1783 Treaty and the Jay Treaty do not provide a period of limitation applicable to petitioner's action and by nonetheless imposing such a limitation apparently as a matter of federal common law, the decisions below directly present the question.

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[3] *Goldwater v. Carter*, 444 U.S. 996 (1979), is not to the contrary. The issue there was whether the President, without the participation of the Senate, could implement a termination provision in the Taiwan treaty. Article X of the Mutual Defense Treaty Between the United States and the Republic of China of December 2, 1954, 6 UST 433, TIAS No. 3178. The issue, therefore, was not an abrogation of a treaty by means of law other than a subsequent treaty or federal statute.

In neither a subsequent treaty nor federal statute have the courts below found a time bar applicable to petitioner's action. Instead, they have barred the claim by a means impermissible under the Supremacy Clause: the fashioning of their own time bar. Relying in part on Justice Stevens' dissent in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 262 (1985), the courts below found petitioner's claim to be barred by laches. APP 34-35, 67. Justice Stevens, however, addressed an issue different from the one presented here. He argued that laches should bar the *Oneida* claim because it arose under the common law, not "under any congressional enactment." His discussion, therefore, did not consider the application of laches to a claim under a treaty, where not only the will of the Senate but the contractual agreement of two nations are at stake. Moreover, until this case, no court has ever applied laches to bar a claim arising under a treaty.

The district court also held it appropriate to borrow a state statute of limitations to fill in the interstices of a treaty that did not provide a limitations period. The borrowing cases of this Court relied on by the district court, however, did not apply the borrowing principle to treaties. And even in applying the principle to federal statutes, this Court has never done so in a way that impacted all subsequent claims regardless of when they arose or that, in other words, resulted in the abrogation or revocation of the statute itself. Because of the age of any claim that could be brought under the 1783 Treaty, application of the borrowing principle in this case would bar all claims and effectively result in the abrogation or revocation of the treaty.[4]

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[4] The "state borrowing doctrine" is "rooted. . . in the expectations of Congress" and applies only – but not necessarily – "when Congress has failed to provide a statute of limitations for a federal cause of action." *Lampf v. Gilbertson,* 501 U.S. ___, 111 S.Ct. 2773, 2778, 2778 n. 3 (1991). Treaties, in contrast, embody not the expectations of Congress alone but the mutual accords of two or more sovereign nations. It would be an act of wizardry to interpret the plain meaning of a treaty by construing the absence of a time bar as evidence of an expectation by the contracting parties to have a time bar inserted, one, no less, borrowed from the various laws of this country's states.

The district court's further notion that public policy is a ground for finding petitioner's claim to be time-barred, APP 66, 70, directly conflicts with this Court's rejection of reliance on public policy in the interpretation of treaties. "We do not pause to inquire whether in fact there was any policy of the State of New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved." *United States* v. *Belmont* , 301 U.S. 324, 327 (1937).

In essence, the courts below refuse to recognize that a treaty can provide for permanent rights. This Court, however, has taken an opposite stance, describing in fact the 1783 Treaty as "stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity. . . ." *Society for the Propagation of the Gospel in Foreign Parts v. New Haven* , 21 U.S. (8 Wheat.) 464, 494 (1823); *accord, Karnuth v. United States,* 279 U.S. 231, 237-238 (1928).

2. The Decisions Of The Courts Below, By Engrafting A Time Bar Into Unambiguous Treaty Language Where The History Of The Treaty, The Negotiations, And The Parties' Practical Construction Of The Language Provide No Basis For One, Usurp The Treaty-Making Powers Constitutionally Committed To The Political Branches

In addition to engrafting a time bar into the 1783 Treaty, the courts below conceive an intent by the treaty parties to apply a time bar to claims such as petitioner's. Ignoring this Court's caveat "that both comity and concern for the separation of powers counsel the utmost restraint in attributing motives to sovereign states which have bargained as equals", *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 537, n. 23 (1987), the lower courts, rather than scrutinize and interpret the words of the treaty itself, instead second-guess motives and intentions behind the 1783 Treaty of Peace based on selected historical facts extraneous to the treaty negotiations. This plainly was not the intent of the negotiators. As former negotiator John Adams writes to negotiator John Jay, his colleague at the Paris peace talks: "If any one should ask, What was

the intention of the contracting parties at the treaty? the answer must be, The treaty itself must determine; and any one who reads it may judge, as well as one of the Plenipotentiaries." Adams to Jay, June 16, 1786; 5 U.S. State Department, *The Diplomatic Correspondence of the United States of America, 1783-1789*, p. 134.

Describing what it found was "plainly" not the intent of Article 5, paragraph 2, the appellate panel writes, "We find no logic in the proposition that Great Britain and the United States bargained for and created a right of action that would survive the inaction of the aggrieved parties and their heirs over a period of centuries." APP 30. The Court then chisels out what it characterizes as the treaty's intent: namely, a right of action confined to "loyalists and British subjects", the targets of "state-created obstacles". APP 31. No reference is made to any source in support of these conclusions, least of all to the text of the treaty itself.

The district court, charting the same course, adopts a "reasonable interpretation" approach that it deems "would not support the theory that the drafters of the Treaty actually intended that a claimed heir or assignee would remain immune from the countless other state laws which have been enacted. . . ." APP 61. Again, interpretation of the text of the treaty is bypassed and no attribution is given to any source.

By restricting any right of action under Article 5, para. 2, and Article 6 to "British subjects" and "loyalists and British subjects, [targeted by] state-created obstacles" -- terms which are not used in these articles -- the lower courts have effectively inserted a time bar by confining the benefit of these articles merely to claimants alive at the time of the treaty. Implying these terms in the 1783 Treaty, even were they conformable to general principles of international law, is not permissible. *See United States* v. *Alvarez-Machain* , 504 U.S. ___, 112 S.Ct. 2188, 2196 (1992). "[T]o alter, amend, or add to any treaty . . . would be on our part an usurpation of power, and not an exercise of judicial

functions. It would be to make and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty. . . ." *The Amiable Isabella* , 19 U.S. (6 Wheat.) 1, 71 (1821) (per Story, J.), *quoted with approval in Chan* v. *Korean Air Lines, Ltd.*, *supra*, 490 U.S. at 135.

Interpretation of a treaty is grounded on the treaty language as given, not as judicially edited.[5] "'When interpreting a treaty, we 'begin 'with the text of the treaty and the context in which the written words are used.'"' [Citations omitted.] *Eastern Airlines, Inc. v. Floyd*, 499 U.S. ___, 111 S.Ct. 1489, 1493 (1991). From the painstaking analysis of treaty language in *Eastern Airlines*, it is abundantly clear that by "text" and "context," this Court means the "contemporary

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5 As Justice Scalia aptly remarks: "Of course, no one can be opposed to giving effect to 'the intent of the Treaty parties.' The critical question, however, is whether that is more reliably and predictably achieved by a rule of construction which credits, when it is clear, the contracting sovereigns' carefully framed and solemnly ratified expression of those intentions and expectations, or rather one which sets judges in various jurisdictions at large to ignore that clear expression and discern a 'genuine' contrary intent elsewhere. To ask that question is to answer it." *United States v. Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring).

understanding" of the actual words of the treaty. *Id.* at 1494.

Both Article 5, para. 2, and Article 4 of the 1783 Treaty stipulated that "no lawful impediment" could bar claims prosecuted under their respective provisions. The contemporary understanding of the words "no lawful impediment" in Article 5, para. 2, is made nowhere more apparent than in *Ware v. Hylton, supra*, 3 U.S. (3 Dall.) at 239-240, where Justice Chase examines the phrase as it applies to a successor-in-interest's property claim under Article 4 of the treaty:[6]

> "Shall meet with no lawful impediment," that is, with no obstacle (or bar) arising from the common law, or acts of parliament, or acts of congress, or acts of any of the states, then in existence, or thereafter to be made, that would, in any manner, operate to prevent the recovery of such debts as the treaty contemplated. **A lawful impediment** to prevent a recovery of a debt **can only be matter of law, pleaded in bar to the action**. . . . The prohibition that no lawful impediment shall be interposed, is the same as that all lawful impediments shall be removed. The meaning cannot be satisfied, by the removal of one impediment, and leaving another; and *a fortiori*,

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6 "The action was brought by William Jones, (but as he died, *pendente lite*, his administrator was duly substituted as plaintiff in the cause)...." *Ware* v. *Hylton*, *supra*, 3 U.S. at 199.

> by taking away the less and leaving the greater. **These words have both a retrospective and future aspect**.

Emphasis added. Each of the other justices held a similar opinion, *id.*, at 250, 253, 278, 281, 282-283, while Justice Cushing particularly stressed that "'creditors shall meet with no lawful impediment,' &c., is as absolute, unconditional and peremptory, as words can well express, and made not to depend on the will and pleasure, or the optional conduct, of any body of men whatever." *Id.*, at 284.

John Jay, who with John Adams and Benjamin Franklin negotiated the 1783 Treaty of Peace, observed that cases arising under the "no lawful impediment" clause of Article 5, para. 2, "were [with respect to lawful impediments] within the same principle, and had the same claims to justice and equity as the cases of British creditors [under Article 4], and ought to be provided for accordingly." Letter of John Jay to Secretary of State Edmund Randolph (November 20, 1794), 1 *American State Papers: Foreign Relations* 504. *See also, United States v.*

Nunez, 573 F.2d 769, 771 (2nd Cir. 1978), *cert. den.*, 436 U.S. 930 (1978) (settled principle of statutory construction that same word or phrase used in more than one section of statute will be construed to have the same meaning in next place if its meaning in the first place is clear).

Hopkirk v. Bell, 7 U.S. (3 Cranch) 454 (1806) further elucidates the intent of "no lawful impediment", holding that the term prevented the operation of a state statute of limitations upon a British debt contracted before the treaty.[7]

Article 5, para. 2, and Article 6 contain no "'difficult or ambiguous passages'", and it is only when a treaty does so that a court may "'look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Eastern Airlines, Inc. v. Floyd, supra*, 111

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[7] Nothing in *Hopkirk* supports the appellate panel's reading of that case, that "a statute of limitations would properly be tolled during the period in which the impediment existed." APP 32. The statute of limitations was repealed,not tolled, by the terms of the treaty. *See also, Dunlop v. Alexander*, 8 Fed. Cas. 87, 88 (Cir.Ct. D.C. 1808).

S.Ct. at 1493. Here, the lower courts have indeed looked beyond the written words and, furthermore, have done so without consideration of the history of the treaty, the negotiations, or the practical construction adopted by the parties.[8] Thus, instead of applying this Court's objective treaty interpretation standard, requiring review of the documented history of the treaty itself and the documented explanations of the parties involved, the courts below have substituted "estimations of what the treaty drafters might have had in mind," *Chan v. Korean Air Lines, Ltd., supra,* 490 U.S., at 134, based on the courts' speculation about historical circumstances that may or may not have informed the treaty negotiations.[9]

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[8] In only two instances does the appellate panel make reference to the history of the treaty. In one place, the panel noted Britain's displeasure in 1791 over the United States' non-compliance with articles 4, 5, and 6 of the 1783 Treaty. APP 10. In another place, unrelated to a discussion of the treaty, the panel cited a letter from Benjamin Franklin pertaining to wartime confiscations. APP 17. Neither of these references are relevant to the issues here.

[9] Even when, unlike here, a treaty clause protecting rights is ambiguous, the canon of construction that treaties be "liberally" interpreted, *Eastern Airlines, Inc. v. Floyd, supra,* 111 S.Ct. at 1493, requires that "where a provision of a treaty admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Bacardi Corp. of America v. Domenech,*311 U.S. 150,

Under this subjective approach, whether a treaty continues to be honored is left to how judges feel about its continued enforcement. Judges do not enjoy this discretion under the Constitution. [10]

A. The 1783 Treaty Negotiation History Is Clear: The Parties Did Not Intend That Any Time Bar Would Shackle Actions To Enforce Rights Arising Under Article 5, Para. 2, And Article 6

The 1783 Treaty of Peace evolved through a series of three drafts and an alternate draft 3 kept by the British negotiators for their private use. None of these drafts indicate that any time-bar was intended for causes of action arising under Article 5, para. 2, and Article 6.

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163 (1940)(citations omitted). This principle dates back at least to Justice Story, who applied it to the Jay Treaty's Article 9. *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 249 (1830).

[10] Even when a fundamental change of circumstances prejudicial to the nation may justify the unilateral suspension or termination of treaty obligations, this power of termination, under the *rebus sic stantibus* doctrine, can only be invoked by the political branches. *Trans World Airlines, Inc. v. Franklin Mint Corp.* 466 U.S. 243, 253 (1984); 1 *Restatement of the Law (Third), Foreign Relations Law of the United States* "336, pp. 218, 220 (f).

The first draft, of October 8, 1782, lacks any "no lawful impediment" provision. 5 Wharton, *Diplomatic Correspondence* 805-807. The second draft was drawn up on November 5, 1782. In it, the "no lawful impediment" language first appears with respect to debts owed to British creditors; i.e., such persons shall "meet with no lawful impediment to recovering the full value or sterling amount of such *bona fide* debts as were contracted before the year 1775." 5 *Revolutionary Diplomatic Correspondence of the United States* 853 (Wharton, ed.). Importantly, this stipulation was first conceived by American negotiator John Adams not as an express provision but as a recommendation to the states, making it at least in form a matter of their discretion whether to implement it or not. 3 Adams, *The Works of John Adams* 301. Draft 2 also contains the beginnings of an amnesty provision that was to become Article 6 of the Treaty. 5 *Revolutionary Diplomatic Correspondence of the United States* 852 (Wharton, ed.).

The sweeping "no lawful impediment" language of the creditor provision in draft 2, language proposed by the American negotiators themselves, became the core feature of both Article 4 and Article 5, para. 2, of the concluded treaty. As British Colonial Secretary Townshend explained to his British negotiator, the terms of Article 5, para. 2, including the protection from lawful impediments, were modeled exactly on the terms of Article 4.

> The provisions regarding the debts being exactly in the terms which they proposed we apprehend there can be no difficulty on that subject. I must here observe that the article now proposed for restitution is formed exactly upon the same model.

Thomas Townshend to Henry Strachey, 19 Nov. 1782, XIX *Documents of the American Revolution, 1770-1783* at 141 (R.G. Davies, ed.).

The British negotiators submitted the next draft of the treaty, draft 3, to the American delegation in Paris on November 25, 1782. 6 *Revolutionary Diplomatic Correspondence of the United States* 74-77 (Wharton, ed.). It contains, in substance, the

version of Article 6 that was to be finally agreed upon. It does not, however, contain a version of Article 5, paragraph 2. That provision first appears in alternate draft 3, kept privately by the British. It was one of several variants appended to what Townshend refers to as "the article now proposed for restitution". Draft of Preliminary Articles of Peace (November 19, 1782) sent by Townshend to British negotiator Henry Strachey, C.O. 5/8, Library of Congress, MSS. Division, Accession No. 11467, Reel 5, pp. 358-359, C.R. 47, Ex. 13 ("Supplemental Modification"). Borrowing the "no lawful impediment" language from the creditor stipulation, the draft of this article -- with the addition of two words -- would become Article 5, paragraph 2, of the concluded treaty signed on November 30, 1782.

Draft 3 had its own article for restitution, using far more comprehensive language than alternate draft 3. It stipulated the restitution of "all estates, rights and properties", rather than merely confining itself to preserved interests in confiscated land that were intact

at the time of the treaty. Hence, the crucial difference between draft 3 and alternate draft 3 in this respect is that the latter did not annul confiscations of property interests that the states had already carried out, but merely safeguarded those interests that remained.

Draft 3's version of the restitution article was not accepted by the American side. Subsequently, it was reworked into a recommendatory provision, requiring for its implementation the approval of the state legislatures. Redrafted in that form, it became Article 5, paragraph 1, of the concluded treaty. If the treaty negotiators had bargained to submit the rights guaranteed by Article 5, paragraph 2, or Article 6 to state legislative discretion, they would have used recommendatory language. Or they could have conditioned actions arising under these provisions on a state law or other time bar.

Where intended in the treaty, a time bar was inserted. In Article 5, paragraph 1, for example, it is specified that persons referred to therein are free to go to the United States "and to remain therein twelve

months unmolested. . . ." In Article 3, American fishermen are allowed the liberty to dry and cure fish in British territory "so long as the same shall remain unsettled." The absence of a time bar in Article 5, paragraph 2, and Article 6 is conspicuous of their intent that there be none.

In short, if the negotiators had agreed to a limitation on the rights protected under Article 6, "it would have been very easy to have declared that purpose in unmistakable terms." *United States v. Stuart, supra*, 489 U.S. at 373 (Scalia, J. concurring in judgment) (citing *Rocca v. Thompson,* 223 U.S. 317, 332 (1912). They could, for example, have used the article 6 expression "at the time of the Ratification of the Treaty in America" to delimit the "persons" encompassed in article 5, para. 2., instead of keeping the language general.

B. This Court's Decisions In *Carver v. Jackson* And *Fairfax's Devisee v. Hunter's Lessee* Also Support The Conclusion That, In The Absence Of A Time Bar Provided In A Subsequent Treaty Or Federal Statute, No Time Bar Can Impede An Action Arising Under Article 5, Para. 2, And Article 6

Carver v. Jackson, 29 U.S. (4 Pet.) 1 (1830), was one of three test cases presented to the Supreme Court by John Jacob Astor and his successors-in-interest.[11] *Id.* at 55. Neither he nor they were British subjects or loyalists, nor was their claim based on any interest they had held in confiscated land at the time of the treaty. Astor originally purchased this claim in 1809 from the children of Roger and Mary Morris. C.R. 47, Ex. 18, p. 878. The Morris parents had been attainted under New York State's 1779 Act of Attainder, and their estate, comprising 48,472 acres of land or over one third of Putnam County, New York, was confiscated under the Act. *Journals of the New York State Senate* 197 (Feb., 1827). The state had

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[11] The other two cases were *Kelly* v. *Jackson*, 31 U.S. (6 Pet.) 622 (1832), and *Crane* v. *Morris*, 31 U.S. (6 Pet.) 598 (1832). Astor and his successors-in-interest won all three cases, after which New York purchased the Morris claim. See, Act of April 5, 1832, Laws of New York, 55 Sess., c. 86; (APP 98-99).

thereupon divided the property into lots and sold them, by conveyance with warranty, to 234 purchasers in the region. They and their families, and the generation that followed them, populated this region, believing that they had received good title from the state.

Living in Great Britain, the Morris children nonetheless continued to hold an interest in the confiscated land. The interest derived from a 1758 marriage settlement. Under the settlement, their parents held a life estate in the property and they, the children, held the vested remainder. *Carver*, *supra*, 29 U.S. at 81, 92.

In 1830, over a half century after the purported confiscation, this Court ruled in favor of Astor's title. Upon winning all three test cases, Astor sold his Putnam title to the State of New York, under an agreement worked out with the state. Act of April 5, 1832, Laws of New York, 55 Sess., c. 86, APP 98-99.

Carver rejected the application of five statutory lawful improvements, including two occupying claimant statutes. As to the effect of the treaty's Article 5,

paragraph 2, and Article 6 on the latter two statutes, the Court states:

> He [the winning party] was to meet with no impediment to the assertion of his just rights; and no future confiscations were to be made of his interest in any land. His just rights were at that time to have the estate, whenever it should fall into possession, free of all incumbrances or liens for improvements created by the tenants for life, or by purchasers under the state.

29 U.S. at 100-101.

In the case at bar, the appellate panel adopted an argument first made by Daniel Webster, attorney for the plaintiff in error in *Carver, supra,* 29 U.S. at 79, holding that the treaty's Article 5, paragraph 2, encompassed only certain lawful impediments, excluding those created by "the statutes and doctrines which apply equally to all individuals seeking to recover land." APP at 32. The *Carver* ruling, however, flattened that argument, since New York's occupying claimant statutes, as written, applied equally to all indivduals seeking to recover land, including Astor and his successors.

Also raised in *Carver* as a bar to Astor's claim were three New York statutes of limitations. *Id.*, at 37. These, too, the Court rejected, although it did so without discussion. Interpreting this silence, the appellate panel concluded that these statutes, rather than being preempted by the treaty, had not yet run against Astor's claim. APP 32. The panel reasoned that since Astor's right to possession had not accrued until 1825 -- the year Mary Morris, the surviving parent, died -- the commencement of Astor's suit thereafter was within the statutory period. *Society for the Propagation, & c. v. The Town of Pawlet, & c.*, 29 U.S. (4 Pet.) 480 (1830), however, decided by Justice Story in the same term as his decision in *Carver*, refutes this conclusion. Explaining why the plaintiffs were subject to the restrictions in a Vermont statute, Story writes: "The treaty of peace of 1783, the British treaty of 1794, do not apply to the case. The right of action, if any, of the plaintiffs, did not accrue until the year 1795." *Id.*, at 509. In writing the *Carver* opinion, therefore, Justice Story could only have determined that Astor's right of

action had accrued before 1795, not in 1825. Otherwise, the 1783 Treaty of Peace would not have protected Astor from New York's occupying claimant statutes. Such right of action, accruing on a claim before 1795, would have been long barred by New York's statutes of limitations, were it not for the treaty. The Act of March 28, 1797, Laws of New York, 20 Sess., c. 52, allowed five years to prosecute after the "estate, right, title, claim or demand" accrued. The Act of April 8, 1801, Laws of New York, 24 Sess., c. 183, [Sec. "Actions for lands by indivdual"] allowed 25 years from a "seisin or possession" of the plaintiff, "or of the ancestor or predecessor of such plaintiff. . . ."[12] Thus, contrary to the appellate panel's finding, APP 37, the evidence in *Carver* affirms petitioner's contention that an action arising out of the confiscation

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12 "Seisin" here can only signify "seisin in fact", i.e. a title that includes both the freehold and actual possession; otherwise, the statute would have posed no limitations bar at all to Astor no matter how long he waited to bring his claim, since from 1809 on he never lost the freehold, or seisin in law, of the Morris interest he had purchased.

of loyalist land can meet no state time-bar impediments.

Despite the magnitude of Astor's claim, his test case victories before this Court did not move Congress to act. Despite the arguments raised at the time by Daniel Webster, counsel for the *Carver* defense, 2 *The Papers of Daniel Webster* (series 2: Legal Papers), p. 100 (A. Konefsky, ed.), that ratification of Astor's claim would cause, to use Justice O'Connor's words, an "undoing of settled history," "disrupt the settled expectations of landowners, . . ." *see Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 485 (1988) (O'Connor, J., dissenting), and "result in gross prejudice to. . .successors-in-interest to the. . .confiscated estate," APP 36, Congress was impelled neither to enact a federal statute of limitations on claims arising under the 1783 Treaty of Peace nor to modify in any way the provisions in Article 5, paragraph 2, and Article 6 of the treaty.

The successor-in-interest claim of John Jacob Astor was a sequel to the precedent set by U.S. Chief

Justice John Marshall, who also purchased from British aliens a claim to property, 2 *The Papers of John Marshall* , pp. 148-149 (Hobson ed.), that was held confiscated under state law. *Hunter v. Fairfax's Devisee* , 1 Mumf. 218, 227-228, 237 (Va. Sup. Ct. App. 1809).

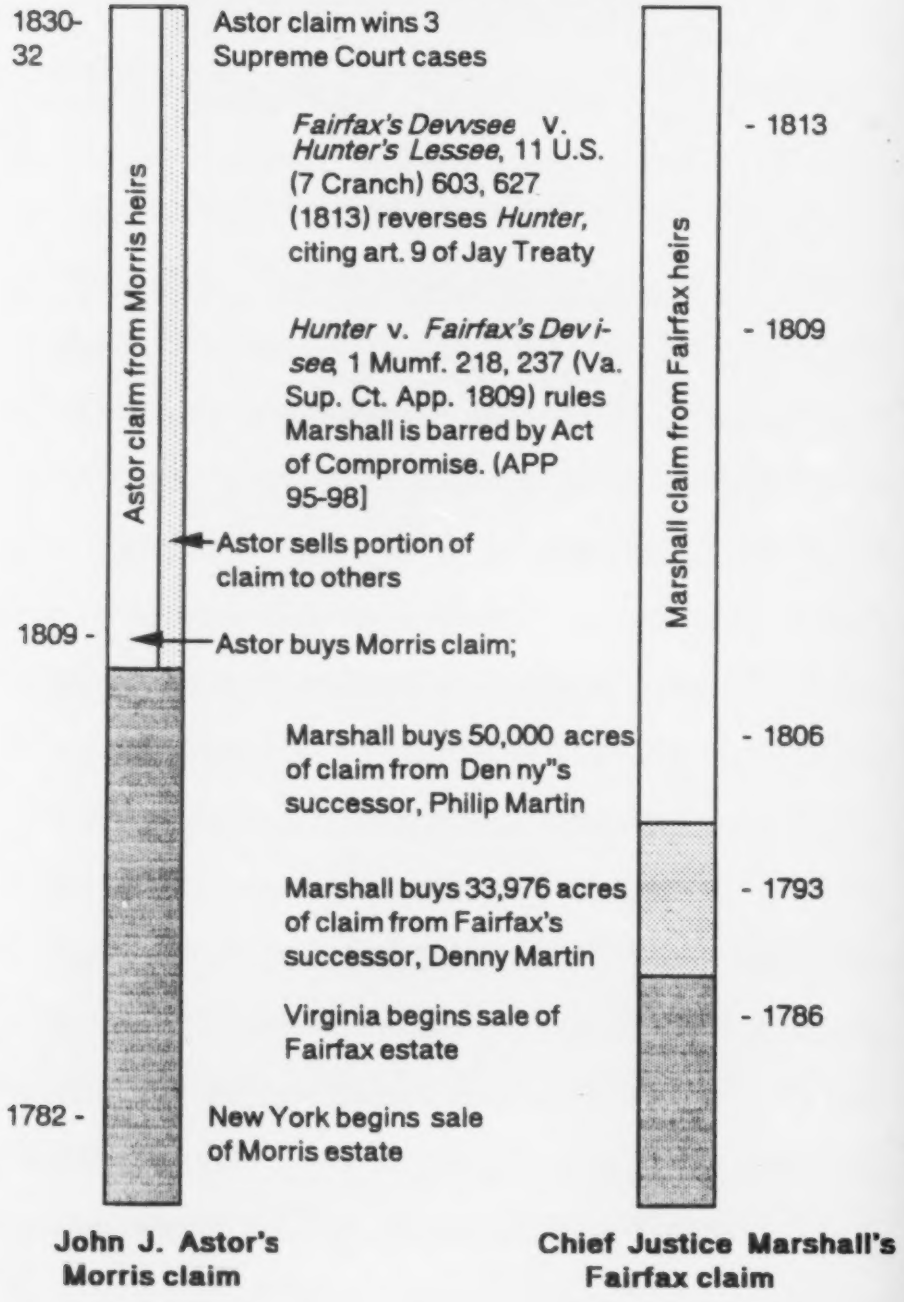
Marshall's claim was based on Article 6 of the 1783 Treaty of Peace, *id.*, at 225, although Marshall acquired no interest in the Fairfax estate until 1796, thirteen years after the treaty. 2 *The Papers of John Marshall* , pp. 148-149 (Hobson, ed.).

In 1796, Marshall settled his claim with the State of Virginia. An act of the Virginia legislature approved the settlement. Laws of Virginia, ch. 14 (December 10, 1796), APP 95-98. As part of the settlement, Marshall relinquished to Virginia his claim to a majority of the lands at issue in exchange for confirmation of his title to the remainder. Despite this agreement, Marshall resumed litigation on his claim to lands within the portion he had agreed to relinquish. *Hunter v. Fairfax's Devisee*, *supra* , 1 Mumf. at 232.

When the case reached Virginia's highest court in 1809, the court unanimously concluded that the claim was barred by state laws, including a limitations act. *Id.* at 231-232, 237. This Court reversed, holding that even if Article 6 of the treaty of peace did not protect Marshall's title to the portion of the Fairfax estate claimed, Article 9 of the 1794 Jay Treaty did. *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch.) 603, 627 (1813).

Importantly, contrary to the conclusions of the lower courts here, this Court did not find Marshall's cause of action to be impaired either by his failure to have a property interest in the Fairfax estate at the time of the 1783 or 1794 treaties, or by a time bar or other state law defenses.

Two Successor-In-Interest Claims Under The 1783 Treaty Of Peace



3. The Rulings Below Sanction The Violation of Petitioner's Treaty-Protected Rights By Ignoring This Court's Decisions Pertaining To The Law That Governed In British Held Territory, And By Contriving A Confiscation That Under New York Law Never Took Place

Petitioner's successor-in-interest claims are brought principally on two alternative grounds. APP 13. First, petitioner claims that since Parker Wickham had title and possession of Robins Island before and throughout the American Revolution and until the British evacuated Long Island after the 1783 Treaty of Peace, New York's expropriation and sale of this property in fee simple in 1784 was a prohibited "future confiscation" in violation of Article 6 of the treaty.

Second, petitioner asserts that even if New York's 1779 Act of Attainder had taken effect on Long Island while the British remained in control of the territory, title and possession of Robins Island continued in either Parker Wickham or his son, Joseph Parker Wickham until after the British evacuation in November 1783. The subsequent taking and sale of Robins Island by

New York was a "future confiscation" in violation of Article 6 of the 1783 Treaty of Peace.

The rights secured by Article 6 were further guaranteed in Article 9 of the 1794 Jay Treaty.

A. The Rulings Below That New York Had The Jurisdiction To Enforce Its Attainder Law In Enemy-Held Long Island Directly Conflict With Two Decisions Of This Court

In 1776, British troops captured and occupied Long Island and, thereafter, Great Britain remained in exclusive governmental and military control of the territory for the duration of the war. APP 5. Hence, Robins Island and its owner, Parker Wickham, were situated in a territory outside New York's governmental limits at the time New York adopted the Attainder Act in 1779. New York was first able to take possession of Robins Island after the withdrawal of the British in November 1783. APP 12, 27. In other words, New York's territorial dominion of Long Island and actual possession of Robins Island postdated the 1783 Treaty of Peace.

Article 6 of the treaty prohibits "future confiscations" and "any future loss or damage . . . in . . . property" by reason of the part which a person may have taken in the Revolution. APP 85. The Article is written in "general and unqualified" language, allowing "no room for construction." *Society for the Propagation of the Gospel in Foreign Parts v. New Haven, supra*, 21 at 490.

The appellate panel held that the 1779 Act of Attainder "stripped" Parker Wickham "of any and all title, ownership or interest in real property existing in the State of New York." APP 22. His property interest in Robins Island was "then vested, absolutely and immediately in New York." *Id.* This expedient conclusion neatly sidesteps the central issue presented, that is, whether Robins Island, during the British rule of Long Island, was property existing within a territory where New York could assert and enforce its laws: in short, whether it was "real property existing in the State of New York." This issue is underscored by the fact that New York unquestionably

did not have "possession" of Robins Island in 1779. It is only when both the "right" to the territory and "possession" are united that "full sovereignty" can be claimed. *Davis v. The Police Jury of Concordia*, 50 U.S. (9 How.) 280, 289 (1850).

Two dispositive decisions of this Court directly conflict with the panel's assumption that New York had the jurisdiction and power to enforce the Attainder Act on Long Island prior to the 1783 Treaty of Peace.

Inglis v. Trustees of the Sailor's Snug Harbor in the City of New York, 28 U.S. (3 Pet.) 99 (1830), deals directly with the issue, confronting head-on whether New York law, including the Act of Attainder, could operate in British-held territory. *Id.*, at 125. *Inglis* held that the "government of the state of New York did not extend to it [territory "in the possession of the British"] in point of fact." *Id.*, at 124-125. For the purpose of New York law, persons "within British lines, and under the protection of the British army" were "not . . . abiding in the state [of New York] and owing allegiance to the laws of the same." *Id.*, at 125.

United States v. Rice, 17 U.S. (4 Wheat.) 245 (1819), addresses the identical question and holds that federal law "could no longer be rightfully enforced . . . or be obligatory upon the inhabitants" in British-held territory in Maine during the War of 1812. 17 U.S. at 253. These inhabitants were bound only by British law since such territory, as a matter of law, was outside the United States during the period of enemy occupation. *Id.*

Both *Inglis* and *Rice* squarely conflict with the conclusion of the courts below that the law of a state or of the United States could operate in an enemy-held jurisdiction during the period of occupation. *Carver v. Jackson*, *supra; Harden v. Fisher*, 14 U.S. (1 Wheat.) 139 (1816); and *Ware v. Hylton*, *supra*, referenced by the panel to support its conclusion that the Act of Attainder was valid in affecting property interests in British-occupied Long Island prior to the 1783 Treaty of Peace, APP 16, are not to the contrary; they are irrelevant to the issue. Each involved matters arising outside British-held territory. None address the

subject of New York governmental power in British-held territory.[13]

Additionally, a British precedent, *Ogden v. Folliott;* 29 King's Bench, 3 Term Rep. 726 (1790), also rejected the notion that New York's Attainder Act and other law operated in British-held territory, New York City, during the Revolution. In that case, Chief Justice Lord Kenyon wrote:

> If we were to consider the Acts of the province of New York as binding, as has been contended, I am at a loss to know why all the property of those persons, which was said to be confiscated, did not pass to the executive power of that State to whom it was said to be forfeited; and why an action might not have been brought in the name of such executive power to enforce the payment of this bond; and how an action could have been brought in the name of the obligee.

Id. at 731.

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[13] *McGregor v. Comstock,* 16 Barb. 427 (N.Y.Sup.Ct. 1853), *aff'd. on other grnds.,* 17 N.Y. 162 (1858), another case cited by the panel, incidentally mentions the circumstance of a confiscation in New York City in the course of a lengthy discussion of a chain of title. *McGregor* begs the question of the British military occupation of the city by assuming, without reference to it or to any authority, that the confiscation, carried out under New York's Attainder Act, occurred before the 1783 Treaty of Peace and hence before the British evacuation. To this extent, *McGregor* conflicts with *Inglis* and *Rice*, and cannot serve to answer a question it doesn't even address.

In sum, the British occupation of Long Island established British *de jure* sovereignty to the exclusion of New York sovereignty, law, and jurisdiction until after the British evacuated the region. Accordingly, when New York first exercised governmental authority there after the evacuation, the enforcement of the Attainder Act to confiscate Robins Island was a "future confiscation" prohibited by Article 6 of the 1783 Treaty of Peace.

B. New York's unsuccessful efforts to enforce its Act of Attainder in Vermont further underscore the error of the rulings below that the Act could have effect in enemy-held territory.

That New York's Act of Attainder was limited to territory where New York had the governmental power to enforce it is demonstrated by its inability to enforce this law in New York territory that became Vermont.

The history of Vermont's formation provides a conclusive example of the doctrine expressed in *Inglis* that enemy possession established sovereign rights to the exclusion of New York jurisdiction and law,

including the Attainder Act. Vermont was originally a part of New York. *Vermont v. New Hampshire*, 289 U.S. 593, 607 (1933). In 1777, it declared independence. *Id.* New York resisted this revolutionary act and did not recognize Vermont until 1790. *Id.*, at 608. And although the Continental Congress never recognized Vermont's independence and Congress under the Constitution did not do so until 1791 when Vermont was admitted as a state in the Union, *Id.*, at 607-608, only Vermont law was enforceable in its territory after its independence. *See, eg., Society for the Propagation, & v. Pawlet, supra,* 29 U.S. (4 Pet.) at 503.

Kent describes the belligerent relationship between New York and Vermont:

> The territory comprising the State of Vermont belonged to this State; and it separated from it, and erected itself into an independent State, without the consent, and against the will, of the government of New York. The latter continued for many years to object to the separation, and to discover the strongest disposition to reclaim by force the allegiance of the inhabitants of that State. But they were unable to do it; and it was a case of a revolution effected by force, analogous

> to that which was then in action between this country and Great Britain.

1 Kent, *Commentaries on American Law* *178 (11th ed., 1867).

Subsequent to Vermont's declaration of independence from New York, New York attempted to enforce its Attainder Act there. These attempts were fruitless, "Certificate from the Commissioner of Forfeiture in the Case of Daniel Claus and others," State of New York, Eastern District (Salem, 19 August 1786, London, Public Record Office, A.O. 12/90, p. 196 [56]), despite the fact that as late as 1788 New York law continued to describe Vermont territory as part of New York. Act of March 7, 1788, Laws of New York, 11 Sess., c. 63.

New York's 1779 Attainder Act also considered Vermont territory to be part of New York, attainting, for example, Philip Skeene of "Charlotte" County, APP 90, even though Charlotte County had by then become part of Vermont and Philip Skeene's estate was to be actually confiscated by Vermont on October 27, 1779, five days after its nominal confiscation under New

York's Act of Attainder. 6 *Vermont State Papers* , pp. 29-30 (Nye ed.). New York's Attainder Act obviously had no more effect in enemy-occupied Vermont than it had in enemy-occupied Long Island.

Extra-territorial confiscation cannot be determined by mere operation of law, as the courts below erroneously concluded, but requires the power to enforce the law by possession. Distilled, the position of the lower courts boils down to an acknowledgment that the British occupation was a historical fact except for the purposes of New York's 1779 Act of Attainder.

C. Even If The Act Of Attainder Had Taken Effect In British-held Long Island Upon Enactment In 1779, The Courts Below Erred In Finding That The Act Confiscated Parker Wickham's Property Interest In Robins Island; They Erred, As Well, In Holding That The 1782 Act To Abolish Entails Gave New York Fee Simple Title To Robins Island.

Until the decisions below, no case has ever determined the joint effect, if any, of both the 1779 Act of Attainder and the 1782 Act To Abolish Entails on entailed property rights. Assuming that the Act of Attainder had taken effect on Long Island upon enactment in 1779, the fundamental error of the courts below is their conclusion that the joint effect of these two Acts was to give New York fee simple title to Robins Island. These Acts, however, did not have this effect for four principal reasons.

First, as the appellate panel correctly found, New York did not acquire actual seisin or possession of Robins Island until the British evacuation in November 1783. APP 27. Yet, the panel also concluded that the Act of Attainder by being "self-executing", APP 18, "fully confiscated" Parker

Wickham's estate upon enactment. *Id.* If, however, the Act was "self-executing" and a *fait accompli* in fully and immediately confiscating Parker Wickham's estate, New York would have secured "the full and actual seisin and possession" of Robins Island. *Smith v. Maryland,* 10 U.S. (6 Cranch.) 286, 306-307 (1810). By the panel's own findings, therefore, the Act of Attainder, whether self-executing or not, did not fully and immediately confiscate Parker Wickham's estate in Robins Island. The reason was the British occupation. APP 27.

The panel relies on *Smith* to make sense of its contradictory conclusions, only to misunderstand what this case actually says. *Smith* makes clear that the confiscation there at issue was complete precisely because the Maryland statute provided that upon enactment the state would be "in the full and actual seisin and possession" of the confiscated property. 10 U.S. (6 Cranch.) at 306. Wholly unlike the Maryland laws at issue in *Smith* and their enforceability, the Act of Attainder, as the panel below held, did not give New

York "actual seisin" in Robins Island, APP 27, that is, "actual or constructive possession." APP 26-27.

Second, since New York did not have possession of Robins Island, it could not have "stepped into Parker Wickham's shoes. . . .", as the panel wrongly held, APP 23-24, and become "[a] tenant in fee tail . . . hav[ing] seisin as the owner of the property in possession of the land." APP 26.

Estates are held either in possession or in expectancy. II *Blackstone's Commentaries*, Chap. 11, *163. If New York's interest in Robins Island was not an estate in possession, the estate could only have been one in expectancy. Without possession, New York could have had an estate in expectancy in Robins Island constituting a "seisin in law", APP 26, but only if New York stood in the shoes of a remainderman. The New York cases cited by the panel make that point absolutely clear. APP 27. The panel, however, also makes absolutely clear that New York did not hold a remainder interest in Robins Island. APP 23-24. Consequently, New York's

interest in Robins Island qualified as neither an estate in possession nor an estate in expectancy. Simply, it didn't exist.

Third, even assuming that New York was seized of an interest in Robins Island under the Act of Attainder, New York's interest was not an estate tail.

The appellate panel held that because Parker Wickham was seized of an estate tail, it was that very estate which New York took under the Attainder Act. APP 22. The panel overlooked, however, the role which inheritance plays in defining what an estate tail is. "In all cases, the estate tail was, by definition, a freehold estate in which there was a fixed line of inheritable succession, limited to the issue of the body of the grantee or devisee, and in which the regular and general succession of statutory heirs was cut off." APP 20-21. This estate, therefore, is distinguished by the inheritance it designates. "As the word *heirs* is necessary to create a fee, so in further limitation of the strictness of the feodal donation, the word *body*, or some other words of procreation, are necessary to

make it a fee-tail, and ascertain to what heirs in particular the fee is limited." II *Blackstone's Commentaries*, Chap. 7, *114-115.

As the court of appeals observed, New York's 1779 Act of Attainder "did not, in itself, 'disentail' Parker Wickham's heirs". APP 22. Therefore, despite this Act Joseph Parker Wickham continued "as issue in tail". APP 27. The appellate panel's very findings, therefore, lead to the conclusion that if "New York confiscated Robins Island, . . . [and] stepped into Parker Wickham's shoes for the duration of Parker Wickham's life," APP 23-24, it took not an inheritance at all but an estate without an inheritance. *Denn v. Clark*, 1 N.J. Law (Coxe) 340, 359-360 (N.J. 1795) ("In many cases, and to many purposes the estate of the tenant in tail is no more than an estate for life. . . . [Where] a man is seized in tail by the gift of his ancestor, he cannot sell or dispose of it, nor can he do any act while the entail continues to deprive his children of it, according to the directions of the ancestor. . . ."); *Hazzard v. Hazzard*, 29 Del. 91, 94, 97

A. 233, 235 (1916) ("The tenant in tail has but a life estate. . . .").

Thus, an estate in A (New York) and the heirs of the body of B (Parker Wickham) is not, as the courts below erroneously concluded, an estate tail in A because the estate is not to A "and the heirs of *his* body". *See*, APP 4, 21 (emphasis added). New York took only an estate "for another's life" and this "cannot be entailed: for this is strictly no estate of inheritance. . . ." II *Blackstone's Commentaries* , Chap. 7, *113. In any case, the recipient of a tenant in tail's estate holds only a life estate. *Comstock v. Comstock,* 23 Conn. 349, 352 (1854). Under the Act of Attainder, therefore, New York did not become seized of an estate tail in Robins Island.

Fourth, since New York's interest -- if any -- in Robins Island was not a seisin "in fee-tail," it could not be enlarged into a fee simple under section 1, para. 1 of the Act. APP 92. And as New York had not been "in the uninterrupted possession" of Robins

Island up to 1782, neither could it qualify under section 1, para. 2 of the same Act. APP 92-93.

Moreover, since Joseph Parker Wickham was never attainted and, as the court of appeals concluded, the attainder of his father did not divest him of his entailed property interests, APP 22, he continued to hold an ownership interest in Robins Island under the will of his great-grandfather Joseph Wickham. APP 4.

As noted by the courts below, the 1782 Act to Abolish Entails was not a confiscatory act. APP 24-25. Its intent was "land reform", APP 29, not the taking of property and the unjust enrichment of the state. "The forfeitures arising from this [1779 act of] attainder, must be sought for in the act, and no where else." *Jackson v. Catlin*, 2 Johns. Rep. 248, 260 (N.Y.Sup.Ct. 1807), *aff'd. sub nom. Catlin v. Jackson*, 8 Johns. Rep. 520 (N.Y. Ct. Err. 1811). In 1782, to have enlarged any interest the state may have had in Robins Island into a fee simple would have resulted in the confiscation of Joseph Parker Wickham's entailed property interest.

The Act of February 20, 1790, Laws of New York, 13 Sess., c. 10, supports petitioner's view that the Attainder Act did not vest an entailed property interest in the state that was enlarged into a fee simple under the 1782 Act to Abolish Entails. This 1790 Act clearly shows that the Attainder Act vested the state only with an interest terminable upon Thomas Jones, the attainted person's, death. APP 93-95. *See,* Clerk's Record 47, Ex. 6B, for the abstract of the estate tail devise referred to in the 1790 law. Though Jones had not yet died, the law provided that the first remainderman be granted, the state's *life interest* in the estate confiscated under the Attainder Act.

John Wells, a prominent New York attorney retained as legal counsel to the commission appointed pursuant to the Act of April 10, 1818, Laws of New York, 41 Sess. c. 100, to investigate John Jacob Astor's 48,000 acre claim, also held the opinion that the Act abolishing entails did not enlarge the interest that New York acquired under the Attainder Act into a fee simple.

> If there is not a sufficient evidence of the common recovery already noticed, then Mrs. Morris at the time of her attainder, continued to be seised of the estate in fee-tail, devised to her by her father's will, and her interest in it, that is a life estate, only was forfeited. The subsequent statute abolishing entails could never receive so violent a construction, as to enlarge the estate, acquired by the state from Mrs. Morris, into a fee. To produce this effect, the state must at the passage of the act last referred to, have been seised of a fee-tail, whereas they were only seised of Mrs. Morris's life estate.

Opinion of John Wells On The Title of John Jacob Astor (October 31, 1818) presented by the commissioners to the New York Legislature on January 29, 1819, Journal of the New York State Assembly 305 (1819), Clerk's Record 47, Ex. 5A, p. 305, para. 4. The Act of February 20, 1790, *supra,* confirms the validity of this interpretation of the 1782 Act to Abolish Entails. This Act recognized a continuing remainder interest in the confiscated property. If following the panel's reasoning, however, the state's interest in the confiscated and entailed Floyd-Jones estate had been enlarged into a fee simple by the Act to Abolish Entails, any remainder

interest in the confiscated estate would have been extinguished. If that had been the case, the grant of the state's interest in the 1790 law would have been to a person having no remaining legal interest in the property.

Because New York, for the reasons given, was unable to confiscate the fee simple title to Robins Island before the British evacuation in November 1783, title continued undisturbed in either Parker Wickham or his son, Joseph Parker Wickham during this period.[14] The 1782 Act To Abolish Entails converted this title from fee tail into fee simple ownership. New York's subsequent seizure and sale of Robins Island was a future confiscation of Parker Wickham's or, alternately, of Joseph Parker Wickham's

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14 The effect of attainder was civil death, *Jackson v. Catlin, supra,* 2 Johns.Rep. at 262. Even under this circumstance, title could have continued in Parker Wickham because New York was unable to enforce its forfeiture and secure actual seisin or possession. *Avery v. Everett,* 110 N.Y. 317, 326 (1888). If it did not, title passed immediatelyto his son, Joseph Parker Wickham because Article 41 of New York's Constitution of 1777 prohibited corruption of the attainted person's blood. The children of the attainted person could not be disabled from inheriting from or through their parent. *See,* Joseph Story, 2 *Commentarieson the Constitution of the United States,* sec. 1299.

property rights in violation of Article 6 of the 1783 Treaty of Peace.

Since the rights secured by Article 6 were reaffirmed and further guaranteed in Article 9 of the 1794 Jay Treaty, whether the property itself was in the actual possession of either Wickham, *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453, 464 (1819); *Owings v. Norwood's Lessee, supra*, 9 U.S. (5 Cranch.) at 345, 348 (1809), New York's seizure and sale of Robins Island also violated this treaty provision.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant its petition.

Respectfully submitted,

BERTRAM E. HIRSCH
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Counsel for Petitioner [15]

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[15] Dwight Holbrook, author of *The Wickham Claim*, served as history consultant and co-preparer of this petition.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 220—August Term, 1991

(Argued: September 25, 1991 Decided: March 23, 1992)

Docket No. 91-7490

ROBINS ISLAND PRESERVATION FUND, INC.,

Plaintiff-Appellant,

—v.—

SOUTHOLD DEVELOPMENT CORPORATION,

Defendant-Appellee.

Before:

MESKILL, WINTER and ALTIMARI,

Circuit Judges.

Appeal from judgment entered in the United States District Court for the Eastern District of New York (Leonard D. Wexler, *Judge*), granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment in a suit to recover title and possession to real property.

Affirmed.

BERTRAM E. HIRSCH, Floral Park, N.Y., *for Plaintiff-Appellant.*

SAMUEL KIRSCHENBAUM, Garden City, N.Y. (Ira Levine, Kirschenbaum and Kirschenbaum, P.C., Garden City, N.Y., of counsel), *for Defendant-Appellee.*

ALTIMARI, *Circuit Judge*:

This appeal stems from a property dispute encompassing events which took place over two centuries ago when the State of New York seized land belonging to individuals who refused to support the American Revolution. The property at issue is Robins Island, an island of approximately 445 acres in the Peconic Bay of Long Island. In 1779, Parker Wickham, then the owner of Robins Island, was stripped of title to this property as punishment for his continued allegiance to the British monarchy.

Plaintiff-appellant Robins Island Preservation Fund ("RIPF"), is a non-profit corporation dedicated to the preservation of Robins Island in its natural state. RIPF alleges that it is the rightful owner of an approximate 75 percent undivided interest in Robins Island, which it claims as successor-in-interest to Parker Wickham, whom RIPF charges was unlawfully deprived of title and possession. Specifically, RIPF claims that New York's Act of Attainder of 1779, pursuant to which the State of New York confiscated and sold the island, was invalid, because at the time of its passage New York had no sovereignty over Robins Island, which was then under British control. RIPF further argues that even if the Act of Attainder were valid in general, it was invalid with regard to Robins

Island because New York took physical possession of Robins Island only after the enactment of the Treaty of Peace of 1783 between Great Britain and the United States, which prohibited future confiscations of British and loyalist property. As an alternative theory, RIPF contends that the Act of Attainder of 1779 seized only a life estate and not a fee simple interest in Robins Island, title to which passed on Parker Wickham's death to his son, Joseph Parker Wickham.

RIPF initiated the underlying action in the United States District Court for the Eastern District of New York (Leonard D. Wexler, *Judge*), seeking, *inter alia*, a declaration of ownership rights in Robins Island against defendant-appellee Southold Development Corporation ("SDC"). SDC is a New York corporation which plans to develop Robins Island. SDC traces its title to its predecessors-in-interest, Benjamin Tallmedge and Caleb Brewster, who in 1784 purchased the island in fee simple from the State of New York. SDC asserts that the seizure and sale of the island during the American Revolution was valid. In addition, SDC initiated a third-party complaint against the State of New York seeking damages in the event of loss of title.

RIPF and SDC cross-moved for summary judgment. Additionally, New York moved for summary judgment against SDC on the third-party complaint. The district court granted summary judgment for SDC and New York, holding, *inter alia*, that the Act of Attainder of 1779, pursuant to which New York acquired title to the island, was valid and that the action was barred by New York's statute of limitations, the doctrine of laches, and public policy. *See Robins Island Preservation Fund v. Southold Dev. Corp.*, 755 F. Supp. 1185 (E.D.N.Y. 1991). RIPF appeals the grant of summary judgment to SDC.

For the reasons set forth below, we affirm the judgment of the district court.

BACKGROUND

This action brought by RIPF requires us to revisit the events surrounding our nation's birth in revolution. However, the events of the American Revolution which we must consider are not widely celebrated today. These events relate to the systematic confiscation of property belonging to those Americans who refused to join the Revolution. We are asked to examine the property rights of persons as they existed over two hundred years ago—when the newly formed states were fighting both British troops and British sympathizers, when individuals could be convicted without trials, and when ancient doctrines controlled the laws of property. Because the underlying action is deeply rooted in historical events, we begin by examining the circumstances surrounding the ownership and confiscation of Robins Island in the eighteenth century.

A. *Parker Wickham's Inheritance*

In 1715, Joseph Wickham, Sr. purchased Robins Island. In 1734, he devised the island to his son Joseph Wickham, Jr. "and to the male heirs of his body lawfully begotten or to be begotten forever." This devise created an "estate tail" by which the devisee, and subsequently his male heirs, would hold only a "fee tail" interest in the property, which would pass at death to the next directly descended male heir. Using this means of conveyance, Joseph Wickham, Sr. intended to pass title to Robins Island from generation to generation in a direct and perpetual line of descent.

At the death of his father, Joseph Wickham, Jr. took possession of the estate. Upon his death in 1749, the land passed to his eldest son, Parker Wickham.

B. *The Act of Attainder*

Parker Wickham was a "loyalist" during the American Revolution. Loyalists were those colonists who maintained their allegiance to the King of Great Britain. This was not unusual in New York which, among the original thirteen colonies, had the largest number of inhabitants sympathetic to the British monarchy. The pro-Crown sympathies of New York's large loyalist population facilitated the capture and occupation by British troops of most of the southern portion of the state, including Long Island, in 1776. Consequently, Robins Island remained under British control for the remainder of the war

Perceiving a threat to the Revolution, American patriots clamored for measures to punish loyalists. In response, the Continental Congress declared on June 24, 1776, that the property of all adherents to the Crown would be liable to confiscation. *See* Allan Nevins, *The American States During and After the Revolution 1775-1789*, at 268 (1969). Following this declaration, New York, under intense pressure from patriot citizens, enacted a series of similar measures resulting in the seizure of loyalist and British property and the disenfranchisement of all persons who either had refused to recognize the authority of the revolutionary government or had aided the British. *See id.*

These measures did not, however, satisfy the more zealous patriots, many of whom were members of the newly convened New York State Legislature. Bowing to intensified popular pressure, the New York State Legislature on October 22, 1779 passed "An Act for the forfeiture and

sale of the estates of persons who have adhered to the enemies of this state" ("Act of Attainder"), commonly known as the Confiscation Act, which declared Parker Wickham and fifty-eight other individuals *ipso facto* convicted of "adherence" to the British. *See* Act of Attainder of October 22, 1779, 1779 N.Y. Laws 3rd Sess., ch. 25 at art. 1. As punishment, all property owned by the "attainted" individuals was declared to be immediately forfeited to the State of New York. *See id.*

C. *The Act to Abolish Entails of 1782*

As the war drew to a close, the American states turned their attention toward eradicating the more offensive vestiges of aristocracy brought to the colonies by wealthy British settlers. An early target was the "estate tail." The estate tail, or "fee tail," was a freehold estate in which there was a permanently fixed line of inheritable succession, strictly limited to the natural children of the grantee or devisee. The use of the estate tail to keep ancestral lands in one family had provided landed British aristocracy with a basis of social and political power seen as incompatible with either the ideals underlying the American Revolution or the social conditions in the new states. *See* Cornelius J. Moynihan, *Introduction to the Law of Real Property* § 6, at 37 (2d ed. 1988) ("Moynihan"); Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. Rev. 273, 295-302 (1991).

The New York State Legislature abolished the estate tail in 1782. In so doing, the Legislature provided:

> That in all cases, wherein any person or persons would, if this law had not been made, had been seized in fee-tail, of any lands tenements heridita-

ments, such person or persons shall, in future, be deemed to be seized of the same in fee-simple.

Act to Abolish Entails of July 12, 1782, 1782 N.Y. Laws 6th Sess., ch. 2 at art. 1. The effect of this Act was to convert all estates tail into estates in fee simple. In 1786, New York passed an almost identical "Act to Abolish Entails" whose only difference lay in curing ambiguities created by omission in the former enactment. *See* Act to Abolish Entails of February 23, 1786, 1786 N.Y. Laws 9th Sess., ch. 12.

D. *The Treaty of 1783*

While the attention of the fledgling states was focused on domestic reforms such as these, formal hostilities between the United States and Great Britain concluded. The Provisional Treaty of Peace ("Provisional Treaty"), was signed by the two countries on November 30, 1782 and ratified by Congress on April 15, 1783. *See* Provisional Treaty of Peace, Nov. 30, 1782, U.S.- Gr. Brit., 8 Stat. 54. The Definitive Treaty of Peace ("Treaty of 1783" or "the Treaty"), which was almost identical to the Provisional Treaty, was concluded on September 3, 1783. *See* Treaty of Peace, Sept. 3, 1783, U.S.- Gr. Brit., 8 Stat. 80. Articles Five and Six of the Treaty of 1783 provided:

Article 5th

It is agreed that the Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the Restitution of all Estates, Rights and Properties, which have been confiscated belonging to real British Subjects; and also of the Estates, Rights and Properties of Persons resident in Districts in the Possession of his Majesty's Arms and

who have not borne Arms against the said United States . . . .

And it is agreed that all Persons who have any Interest in confiscated Lands, either by Debts, marriage Settlements or otherwise, shall meet with no lawful Impediment in the prosecution of their just Rights.

Article 6th

That there shall be no future Confiscations made nor any Prosecutions commenced against any Person or Persons for, or by Reason of, the Part which he or they may have taken in the present War, and that no Person shall on that Account suffer any future Loss or Damage either in his Person, Liberty or Property; and that those who may be in Confinement on such Charges at the time of the Ratification of the Treaty in America, shall be immediately set at Liberty, and the Prosecutions so commenced be discontinued.

The Treaty's provision in Article 5 paragraph 1, that Congress recommend to the states that British and loyalist property be returned, was largely ignored by state governments. In New York, the withdrawal of British troops was quickly followed by the physical seizure of land that New York had declared confiscated pursuant to the Act of Attainder of 1779. Parker Wickham fled to Connecticut, presumably to escape the penalty of death carried by the Act of Attainder, and remained there until his death in 1785. At about the same time, his eldest son, Joseph Parker Wickham, left the United States. In May 1784, the New York State Legislature passed an "Act for the Speedy Sale of Confiscated Estates" ("Speedy Sales Act"), which provided for the sale of lands seized pursuant to the Act of Attainder of 1779. *See* Speedy Sales Act of May 12,

1784, 1784 N.Y. Laws 7th Sess., ch. 64. Several months later, New York sold Robins Island to Benjamin Tallmedge and Caleb Brewster in fee simple.

E. *The Jay Treaty of 1794*

The states did not, however, rest at enforcing punitive measures already enacted. Either ignorant of the provisions of the Treaty of 1783, or motivated by anti-loyalist passion, punitive actions and seizures of property continued. *See, e.g., Bain v. The Schooner Speedwell*, 2 U.S. (2 Dall.) 33 (Adm. Ct. App. 1784) (reversing condemnation by the Admiralty of Rhode Island because ship in question was captured after the Treaty went into effect). New York was among those states passing measures contrary to the Treaty of 1783. *See, e.g., Carver v. Jackson*, 29 U.S. (4 Pet.) 1 (1830) (statute requiring successors-in-interest to dispossessed loyalists to pay for improvements made by tenant who purchased land confiscated by New York pursuant to Act of Attainder of 1779 held violative of Treaty of 1783); *Fisher v. Harnden*, 9 F. Cas. (1 Paine) 129 (C.C.D.N.Y. 1812) (confiscation of lands following post-Treaty conviction under procedure provided in 1779 Act of Attainder held invalid under Treaty of 1783), *rev'd on other grounds sub nom., Harden v. Fisher*, 14 U.S. (1 Wheat.) 139 (1816).

The British, in turn, committed their own violations of the Treaty by expropriating thousands of slaves to England and by refusing to abandon their posts on the Northwestern frontier. *See* John Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1917-18 (1983). When, in 1791, Thomas Jefferson requested a statement from the newly-arrived British Minister Plenipotentiary regarding whether Great Britain intended to honor its

treaty obligations requiring the evacuation of American territory and forbidding the taking of slaves, he was told that the King "was induced to suspend the execution of that article, on his part, in consequence of the non-compliance, on the part of the United States, with the engagements contained in the fourth, fifth, and sixth articles of the same treaty." *Id.* (quoting Letter from Jefferson to Hammond of Nov. 29, 1791 and Letter from Hammond to Jefferson of Nov. 30, 1791, *reprinted in* 1 *American State Papers*: 1 Foreign Relations 188-89 (1832)).

As a result of these violations, tensions between the United States and Great Britain threatened to erupt again into armed conflict. In 1794, John Jay was sent to England to negotiate an agreement concerning the enforcement of the Treaty of 1783. The resulting agreement, commonly referred to as "the Jay Treaty," was signed on November 19, 1794 and embodied an American commitment to cease punitive measures and to permit British subjects to seek redress in American courts despite their foreign alienage. *See* Treaty of Amity ("Jay Treaty"), Nov. 19, 1794, U.S.- Gr. Brit., 8 Stat. 116. Article Nine of the Jay Treaty provided:

> It is agreed that British subjects, who now hold lands in the territories of the United States, . . . shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise, the same, to whom they please, in like manner as if they were natives; and that neither they, nor their heirs or assigns, shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens.

As revolutionary fervor cooled, the enforcement of the Treaty of 1783 became more consistent. Loyalists who

had fled the United States felt secure in returning. In 1789, Joseph Parker Wickham received 2,800 pounds sterling from Great Britain as consideration for the loss of his father's estate. Two years later, he returned to Long Island where he resided for the remainder of his life.

Before turning to the underlying action, we set forth a time line of pertinent events:

1715	Joseph Wickham, Sr. purchases Robins Island.
1734	Joseph Wickham wills Robins Island to his oldest son, Joseph Wickham, Jr. in fee tail.
1749	Joseph Wickham, Jr. dies. His oldest son Parker Wickham survives and takes title to Robins Island.
1754	Joseph Parker Wickham, first son of Parker Wickham, is born.
July 4, 1776	The Declaration of Independence is signed.
July 9, 1776	The Provincial Congress of the State of New York approves the Declaration of Independence.
July 16, 1776	The Provincial Congress of the State of New York resolves that all persons within the state owe allegiance to its laws.
Aug. 1776	American revolutionary forces leave Long Island.
Apr. 20, 1777	New York adopts its first state constitution.

Oct. 22, 1779	Parker Wickham and others are attainted under New York's Act of Attainder; Robins Island is declared confiscated.
July 12, 1782	The New York State Legislature abolishes the estate tail.
Nov. 30, 1782	The Provisional Treaty of Peace is signed.
Apr. 15, 1783	The Provisional Treaty of Peace is ratified by Congress.
Sept. 3, 1783	The Definitive Treaty of Peace is concluded.
Nov. 1783	British forces commence evacuation of Long Island.
May 12, 1784	The New York State Legislature passes the Speedy Sales Act, expediting the sale of confiscated estates.
Aug. 5, 1784	Robins Island is sold to Benjamin Tallmedge and Caleb Brewster pursuant to the Speedy Sales Act.
May 22, 1785	Parker Wickham dies.
1791	Parker Wickham's oldest son, Joseph Parker Wickham, returns to Southold, Long Island after receiving compensation from Great Britain for the loss of his father's estate.

See Dwight Holbrook, *The Wickham Claim* 14-15 (1986) ("Holbrook").

F. *The Underlying Action*

RIPF initiated this action against SDC seeking, among other things, title and possession to Robins Island. RIPF claims title based on various quitclaim deeds it holds from the successors-in-interest to Parker Wickham. In total, RIPF has accounted for approximately a 75 percent undivided interest in Robins Island. Both RIPF and SDC moved for partial summary judgment on the issue of ownership. In support of its motion, RIPF offered several theories of recovery, which it again offers on appeal.

RIPF first charges that because Long Island was not under American control at the time the Act of Attainder was passed, the Act was a nullity at its inception. Secondly, RIPF contends that even if the Act of Attainder were valid when passed, it had no legal effect until Long Island actually came under American control sometime after the British withdrawal, which began late in 1783 and concluded in 1784. According to RIPF, by the time New York took actual possession of Robins Island—an action which RIPF contends is necessary to complete a confiscation—the seizure violated the Treaty of 1783 which had prohibited all post-treaty confiscations of loyalist land.

In the alternative, RIPF insists that the Act of Attainder of 1779 seized only the estate held by Parker Wickham, the attainted loyalist, and not the estate vested in his heirs. Specifically, RIPF notes that in 1754, Parker Wickham had produced a son and male heir, Joseph Parker Wickham. RIPF characterizes the property interest of Joseph Parker Wickham as a "remainder in fee tail" which vested in Joseph Parker Wickham at his birth. The Act of Attainder, according to RIPF, did not seize vested remainders belonging to the children of those attainted, and therefore, New York could only have seized what Parker Wickham

himself held—essentially a life estate. RIPF maintains that the "vested remainder" of Joseph Parker Wickham was left untouched by the attainder of his father. Consequently, RIPF argues, when New York transformed estates tail into estates in fee simple in 1782, Joseph Parker Wickham's interest was transformed into a vested remainder in fee simple. Thus, RIPF concludes that when New York sold the property in 1784 pursuant to the Speedy Sales Act, the purchaser acquired only a life estate for the life of Parker Wickham and not a fee simple interest, as New York had purported to convey.

In support of its motion for summary judgment, SDC denied that RIPF is the rightful owner of Robins Island and asserted that, in any event, this action was barred by, among other things, the New York statute of limitations, and the equitable doctrine of laches. In addition, the State of New York moved for summary judgment on the third-party complaint brought by SDC for indemnity and contribution.

The district court denied RIPF's motion for summary judgment and granted summary judgment for SDC and New York, holding, *inter alia*, that the Act of Attainder of 1779, pursuant to which New York acquired title to the island, was valid, that New York's abolition of estates tail in 1782 extinguished the property interest of the Wickham heirs, and that the action was barred by the New York statute of limitations, the doctrine of laches and public policy. *See Robins Island*, 755 F. Supp. at 1191-95.

RIPF now appeals from the district court's judgment. SDC does not appeal from the grant of summary judgment on the third-party complaint brought by SDC for indemnity and contribution.

DISCUSSION

I. *The Validity of the Act of Attainder*

The Act of Attainder of 1779 named fifty-nine loyalists and declared them "attainted" and convicted of "adherence" to the British. The preamble to the Act of Attainder provided that those individuals

> holding or claiming property within this State have voluntarily been adherent to the said King and his fleets and armies, enemies to this State, and the said other United States, with intent to subvert the Government and liberties of this State and the said other United States, and to bring the same in subjection to the crown of Great Britain by reason whereof the said persons have severally justly forfeited all right to the protection of this State and to the benefit of the laws under which said property is held or claimed.

As one of those named, Parker Wickham was

> declared to be *ipso facto* convicted and attainted of the offence aforesaid, and that all and singular the estate, both real and personal, held or claimed by them, the said persons severally and respectively, whether in possession, reversion or remainder, within this State, on the date of the passing of this act, shall be and hereby is declared to be forfeited to, and vested in the people of this State.

Act of Attainder of October 22, 1779, 1779 N.Y. Laws. 3rd Sess., ch. 25 at art. 1. The effect of this attainder was, therefore, immediately to strip Parker Wickham of title to all property owned by him within the State of New York.

RIPF contends that because the British were occupying Long Island at the time of the Act of Attainder, it was a nullity at its passage. We disagree.

In adjudicating property rights affected by New York's Act of Attainder of 1779, neither the Supreme Court nor any court of New York State has ever declared the Act to be invalid. *See, e.g., Carver v. Jackson* 29 U.S. (4 Pet.) 1 (1830); *Harden v. Fisher*, 14 U.S. (1 Wheat.) 139 (1816); *McGregor v. Comstock*, 16 Barb. 427 (1853), *aff'd*, 17 N.Y. 162 (1858). Indeed, in a case arising shortly after the American Revolution, the Supreme Court expressly recognized that "the exclusive right of confiscating, during the war, all and every species of British property, within the territorial limits of [an American state], resided only in the legislature of that [state]." *Ware v. Hylton*, 3 U.S. (3 Dall.) 158, 176 (1796) (Chase, *J.*). As property within the territory of the State of New York belonging to an individual who remained loyal to the British Crown, Robins Island was susceptible to confiscation at any time after the commencement of hostilities. Accordingly, we reject RIPF's premise that the Act of Attainder was a nullity at its inception because Long Island was under enemy occupation.

RIPF next claims that the Act of Attainder of 1779 was invalid as applied to Robins Island because the property was physically seized after the Treaty of 1783 was executed, thus constituting a prohibited "future confiscation" under Article Six of the Treaty. We reject this contention.

It is undisputed that while Article Five of the Treaty of 1783 merely recommended that the states restore property confiscated during the war, Article Six prohibited any future acts of punishment, including confiscation of prop-

erty, against American loyalists and British subjects.[1] The issue presented is whether New York's confiscation of Robins Island was completed prior to the signing of the Provisional Treaty, in which case it constituted a proper exercise of New York's power to confiscate enemy property, or after, in which case it violated the Treaty's prohibition on future confiscations.[2] Specifically, we examine whether the confiscation of Robins Island was fully effected upon the date of passage of the Act of Attainder of 1779, or upon actual possession by New York sometime after the Treaty of 1783 went into effect.

In *Smith v. Maryland*, the Supreme Court decided this issue in regard to another state's act of confiscation. 10 U.S. (6 Cranch) 164 (1810). At issue in *Smith* was Maryland's Act of October 1780 which purported "to seize, confiscate, and appropriate all British property within [the] state." *Id.* Pursuant to that Act, Maryland claimed the right to the estate of a British property owner. However, because the state remained unaware of its claim on this property until 1801, the state did not take actual possession until long after both the Treaty of 1783 and the Jay Treaty of 1794 had taken effect. *See id.* In deciding

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1 The distinction in treatment of wartime and post-war confiscations is attributed to the general presumption held by the signatories that wartime confiscations "being in virtue of the laws of particular States, the Congress had no authority to repeal those laws." *See* Julius Goebel, Jr. ed., 1 *The Law Practice of Alexander Hamilton* 210 (1964) (quoting Letter from Benjamin Franklin to Secretary of Foreign Affairs Livingston of Oct. 14, 1781, *reprinted in* 5 Wharton, *Diplomatic Correspondence* 811).

2 Though the Constitution of the United States was not yet enacted, we assume for purposes of this opinion that the State of New York was bound by treaties entered into by the national Congress. 1 James Kent, *Commentaries on American Law* *155 (1st ed. 1826-1830) ("Treaties of peace, when made by the competent power, are obligatory upon the whole nation.").

whether Maryland's purported sale of the property in 1803 violated the Treaty of 1783, the Supreme Court held that where a law authorizing a seizure is "completely operative to divest the whole estate of the former owner, and to vest it in the state . . . it is perfectly immaterial, at what time the right of the state to the lands now in controversy, thus completed prior to the treaty, was discovered, or at what time actual seisin and possession was obtained." *Id.* at 176-77. The Court's decision in *Smith* established that a self-executing statute purporting to divest title absolutely was complete at the time of enactment. Thus, a confiscation made pursuant to such a statute would violate neither the Treaty of 1783 nor the Jay Treaty of 1794 regardless of when the state took actual possession.

New York's Act of Attainder of 1779, like the Maryland Act of 1780, was self-executing. This is clear from the language of Article Thirteen of the Act of Attainder which declares:

> That all titles, estates and interests, by executory devise or contingent remainder, claimed by any person hereby, or by virtue of this law, to be convicted, *shall on conviction be as fully forfeited to all intents, constructions and purposes in the law whatsoever to the people of this State as any other titles, claims, estates or interests whatsoever.*

(emphasis added). Under this language a convicted property owner was fully and immediately divested of title, which in turn, was immediately revested in New York. We therefore hold that the estate of Parker Wickham was fully confiscated by the State of New York on October 22, 1779, the date of passage of the Act of Attainder.

As a result, the confiscation of Robins Island did not violate Article Six of the Treaty of 1783 which "refers merely to future confiscations, and has no reference to attainders . . . which had already become complete and absolute." *McGregor v. Comstock*, 16 Barb. at 434 (holding that parcel of land in British-occupied "Southern District of New York," which was forfeited to the state by the Act of Attainder of 1779 and sold in 1785, did not violate the bar on future confiscations in the Treaty of 1783). We therefore find that it is of no moment when New York took actual physical possession of Robins Island.

II. *The Estate Seized By New York*

RIPF next contends that even if the seizure were valid, New York seized and sold only the interest held by the attainted Parker Wickham which was, in essence, a life estate. Specifically, RIPF argues that because Parker Wickham had a son before the passage of the Act to Abolish Entails of 1782, Parker Wickham's son received at birth a vested remainder in fee tail. This remainder, according to RIPF, was not reached by New York's Act of Attainder of 1779, and was subsequently transformed into a remainder in fee simple by the Act to Abolish Entails of 1782. Thus, because New York had seized only the estate of Parker Wickham, RIPF argues this remainder in fee simple was left undisturbed by the sale of Robins Island. That is, the purchasers of Robins Island acquired only a life estate for the life of Parker Wickham. According to RIPF, upon Parker Wickham's death, Robins Island passed in fee simple to his son Joseph Parker Wickham.

This argument rests on an interpretation of the nature of the estate held by Parker Wickham, the reach of the Act of Attainder, and the effect of New York's Act to Abolish Entails. We examine these issues in turn.

a. *The Estate Tail*

Prior to 1285, a gift or devise of real property to a man "and the heirs of his body" constituted a fee simple conditional. The fee was conditioned on the donee having heirs of his body. When this condition was satisfied, the donee had full power of alienation. *See* 2 Richard Powell, *The Law of Real Property* ¶ 193, at 62 (Partick J. Rohan ed., 1990) ("Powell"). Upon the birth of issue to the donee, the only significant distinction between what the donee held and a fee simple estate was that in the event the donee died without leaving surviving issue and without having alienated the land, the property then reverted to the donor, regardless of the survivorship of collateral heirs. *See generally* Moynihan § 5, at 34. The power of alienation in the donee was the product of judicial construction which favored the free alienability of lands. However, the landed nobility of England grew dissatisfied with the result of this judicial construction which permitted the transfer of lands out of their families. Pressure by the nobility resulted in the enactment of the Statute De Donis Conditionalibus in 1285, which declared, contrary to prior judicial interpretation, that conveyances to a donee and "the heirs of his body" should be strictly construed to convey an estate which would without exception pass to the heirs of the donee's body. *See* Statute De Donis Conditionalibus, 13 Edw. I (1285).

Under the Statute De Donis Conditionalibus, the donee was said to hold an estate in fee tail (from the Latin *talliatum* or "cut out of the fee"). The "fee tail" could be further restricted to a specific class of heirs, such as "heirs male" or "heirs female." In all cases, the estate tail was, by definition, a freehold estate in which there was a fixed line of inheritable succession, limited to the issue of the body of the grantee or devisee, and in which the regular

and general succession of statutory heirs was cut off. Thus, under the Statute De Donis Conditionalibus, a donee no longer had a power of alienation.

However, the judicial preference for free alienability of land survived despite the enactment of the Statute De Donis Conditionalibus. English courts began to recognize a fictitious real action known as a "common recovery," whereby a holder of land in fee tail could effectively cut off the interest of the heirs as well as the reversionary interest of the donor. *See* Powell ¶ 193, at 63. After effecting a common recovery, the land holder owned the property in fee simple. The use of the common recovery to convert an estate in fee tail to one in fee simple was commonly referred to as "barring" or "docking the entail."

The rule of construction creating the estate tail was carried to the colonies where it was embodied in devises of land such as in the one concerning Robins Island. The use of the "common recovery" to bar entails was also recognized in the colonies, although it was used infrequently. *See, e.g., Duffy v. Jarvis*, 84 F. 731, 732 (C.C.E.D. Tenn. S.D. 1898) (describing the "common recovery" procedure). Therefore, in the absence of any other action by either Parker Wickham or New York, Joseph Parker Wickham would have succeeded to the estate of his father, Parker Wickham, as owner in fee tail. However, before Joseph Parker Wickham could succeed to his father's estate, Robins Island was confiscated by New York.

b. *The Estate Confiscated Pursuant to the Act of Attainder of 1779*

When New York confiscated the estate of Parker Wickham, it seized his fee tail ownership of Robins Island. RIPF contends that New York's seizure and sale of the

land affected only the life interest held by Parker Wickham and did not destroy the future interest left to his heirs. RIPF characterizes the interest seized as a "life estate." In contrast, SDC argues that by seizing and selling Robins Island, New York exercised its right as tenant in tail to "bar the entail" of Parker Wickham's heirs. In essence, SDC contends that New York's confiscation of Parker Wickham's interest in Robins Island, pursuant to the Act of Attainder, cut off the future interest of Joseph Parker Wickham. We reject both arguments as misconstructions of the effect of the Act of the Attainder.

By its terms, the Act of Attainder stripped the attainted individuals of any and all title, ownership or interest in real property existing in the State of New York. The property interests of the offenders were then vested, absolutely and immediately, in New York. Because Parker Wickham owned Robins Island in fee tail, it was ownership in fee tail that was assumed by New York.

Since an attainder was a criminal conviction, it did not affect the rights of future generations. Indeed, it is axiomatic that the Act of Attainder "vest[ed] in the state . . . the 'estates' only of the offenders." *Carver*, 29 U.S. at 57. It is well-settled that solely by virtue of an attainder, a sovereign did not destroy the future interests of heirs to an estate tail. *See* 4 James Kent, *Commentaries on American Law* *13 (4th ed. 1830) ("[E]states tail were not liable to forfeiture for treason or felony . . . ."); Moynihan § 5, at 35 (At early English common law, "[t]he estate in fee tail was not subject (beyond the tenant's lifetime) to forfeiture for treason or attainder for felony."). Thus, contrary to SDC's assertion, Parker Wickham's attainder for adherence to the British did not, in itself, "disentail" Parker Wickham's heirs. *See Borland v. Dean*, 3 F. Cas. 905, 908 (C.C.D. Mass. 1826) (Story, *J.*) ("The power of

barring the entail was personal to the tenant in tail" and a seizure of property by attainder appropriated the attainted party's tenancy in tail but did not extinguish the estate tail); *see also Carver*, 29 U.S. at 57 ("[P]owers and conditions, personal to the parties, did not, by an attainder, pass to the crown.").

We cannot conclude, however, that because a confiscation by attainder of an estate tail did not disentail an offender's heirs, the estate confiscated was something less than full ownership in fee tail. In contrast to a life estate, an estate tail was, by definition, an estate in which the tenant in tail held virtually unfettered ownership rights to use the property as the tenant saw fit during his or her lifetime.

The rights of a tenant in tail were thus far broader than those of the holder of a life estate. *See* Harold G. Aron, *Aron's Digest of New York Real Property Law* 22 (1923) ([B]efore, [the invention of the common recovery] or after, provided it was not taken advantage of, [the tenant in tail] had the fee for life; this is not at all the same as saying [the tenant] had a life estate in the fee . . . ."); 4 James Kent, *Commentaries on American Law* *18-*19 (John M. Gould ed., 14th ed. 1896) ("Kent (14th ed.)") (discussing the differences in rights and duties between a tenant in tail and the holder of a life estate). For example, the holder of a life estate was liable to the owner of the future estate for waste. *See* Moynihan § 12, at 52-54. In contrast, "[t]he tenant in tail was not chargeable with waste." Kent (14th ed.) at *12.

Simply stated, there is no evidence that in seizing Robins Island, New York changed the nature of the estate from an estate tail into a mere life estate. In short, when New York confiscated Robins Island, it stepped into

Parker Wickham's shoes for the duration of Parker Wickham's life. We therefore conclude that the Act of Attainder of 1779 fully and completely confiscated Parker Wickham's fee tail ownership of Robins Island, which—in the absence of any further enactments—would have passed by inheritance to Joseph Parker Wickham, just as it would have passed had Parker Wickham remained owner.

c. *The Effect on Robins Island of the Act to Abolish Entails*

In 1782, New York passed an "Act to Abolish Entails." *See* Act to Abolish Entails of July 12, 1782, 1782 N.Y. Laws, 6th Sess., ch. 2; *see also* N.Y. Est. Powers & Trusts Law § 6-1.2 (McKinney 1979). The Act to Abolish Entails of 1782 provided:

> That in all cases, wherein any person or persons would, if this law had not been made, had been *seized in fee-tail*, of any lands tenements heriditaments, such person or persons shall, in future, be deemed to be *seized of the same in fee-simple*.

Act to Abolish Entails of July 12, 1782, 1782 N.Y. Laws 6th Sess. ch. 2 at art. 1 (emphasis added). In 1786, New York promulgated an almost identical "Act to Abolish Entails," which superceded the 1782 Act. *See* Act to Abolish Entails of February 23, 1786, 1786 N.Y. Laws 9th Sess., ch. 12.

New York's purpose in promulgating the 1782 and 1786 Acts was to remove the estate tail and the restraints on alienation it engendered. To implement this sweeping land reform, New York sought to eliminate the fee tail in both existing and future estates. Thus, the Acts transformed all existing estates in fee tail into estates in fee simple. *See*,

e.g., *Wendell v. Crandall*, 1 N.Y. (1 Comstock) 491, 493 (1848) (In abolishing estates in tail, the legislature intended "the purpose of reaching all estates tail, without exception."). Furthermore, the acts nullified all future creations of estates in tail by providing that any attempt to convey title in fee tail would convey title in fee simple. *See*, *e.g.*, *Lott v. Wykoff*, 2 N.Y. (2 Comstock) 355 (1849) (a 1797 devise of real property to a testator's sons in fee tail with contingent cross-remainders conveyed an estate in fee simple absolute with no contingent remainders). The Acts accomplished this reform by invoking the feudal concept of "seisin." Any person, "seized in fee tail" of an interest in land, was held to have an equivalent interest in fee simple. In other words, seisin of an estate in fee tail gave an individual seisin of an estate in fee simple.

In the present case, Robins Island already existed as an estate in fee tail prior to the enactment of New York's 1782 Act to Abolish Entails. Because an estate tail was already in operation, the 1782 Act vested an estate in fee simple in whomever was "seized in fee tail" of the property.

In determining in whom seisin lay, the district court considered both the nature of the estate tail and the effect of the 1782 Act to Abolish Entails. The district court concluded that Joseph Parker Wickham, as issue in tail, held only a "future possessory interest" and held that under the terms of the 1782 Act, issue in tail were not given a fee simple interest. *See Robins Island*, 755 F. Supp. at 1190. Therefore, the district court reasoned that after the passage of the 1782 Act, New York—as successor to Parker Wickham—held a fee simple interest which it properly conveyed in the 1784 sale of Robins Island. *See id.*

RIPF claims that the district court erred in construing the 1782 Act. Specifically, RIPF maintains that Joseph Parker Wickham's future interest constituted a "vested remainder in fee tail," which survived both the 1782 and 1786 Acts to Abolish Entails and was, in fact, augmented to a remainder in fee simple. We reject this assertion and agree with the district court that Joseph Parker Wickham's interest in Robins Island was extinguished by the 1782 Act to Abolish Entails.

The central issue presented here is whether, by operation of the 1782 Act, the fee simple arose in Parker Wickham—and hence in New York by way of the 1779 confiscation—or in Joseph Parker Wickham, as Parker Wickham's living male heir. More specifically, we must consider whether under the 1782 Act to Abolish Entails, "seisin" lay in the tenant in tail who had possession of the land or in his male heir who was not yet in possession.

"Seisin," a concept of vast and fundamental importance in early English law, connoted peaceful possession. Moynihan § 1, at 98. "The man who is seized is the man who is sitting on land; when he was put in seisin he was set there and made to sit there." *Id.* (quoting 2 Pollack and Maitland, *History of English Law* 30 (2d ed. 1899)). From its feudal roots, the concept gradually evolved to encompass a claim of title as well as one of possession. By the eighteenth century, seisin came to mean "possession under claim of a freehold estate therein." *Id.* Therefore, a tenant for a term of years had possession, but not seisin, of a freehold estate. A tenant in fee tail, however, had seisin as the owner of the property in possession of the land.

Significantly, seisin did not require actual physical possession of the property, but merely an immediate legal right to possess and enjoy it. Where there was actual or

constructive possession by an owner, this was deemed actual seisin or seisin in fact. *See Vanderheyden v. Crandall*, 2 Denio 9, 21 (N.Y. Sup. Ct. 1846), *aff'd sub nom., Wendell v. Crandall*, 1 N.Y. (1 Comstock) 491 (1848); 1 Alfred G. Reeves, *A Treatise on the Law of Real Property* 379 (1909) ("Reeves"). Yet even absent an act of physical dominion, "[w]here the law casts the freehold upon a person[,] he has before exercising any act of ownership over it, what is called a sei[s]in in law." *Vanderheyden v. Crandall*, 2 Denio at 21; *see also* Reeves, at 379.

Under the common law there must always be someone seized of a freehold estate. *See* Earl P. Hopkins, *Handbook on the Law of Real Property* § 10, at 34 (1896). Moreover, there could be only one seisin of a freehold just as today there can be only one title deed to a piece of property. *See* 1 Emory Washburn, *A Treatise on the American Law of Real Property* 61 (Joseph Willard and Simon G. Coswell, eds. 5th ed. 1887). With regard to Robins Island, it is undisputed that until his attainder, Parker Wickham held both title and possession, and thus seisin, of Robins Island. By his 1779 attainder, Parker Wickham was stripped of his title and, consequently, of legal seisin of Robins Island. The Act of Attainder vested complete and absolute title in New York, and with title went legal seisin. Thus, by virtue of the Act of Attainder, New York obtained legal seisin of Robins Island which, following the withdrawal of the British in 1783, became actual seisin. Consequently, by virtue of the Act of Attainder, New York was "seized of an estate in fee tail." We therefore hold, that under the 1782 Act to Abolish Entails, New York's seisin of Robins Island as owner in fee tail was transformed into seisin as owner in fee simple.

Indeed, the result could not be otherwise. Joseph Parker Wickham, as issue in tail, had neither possession nor own-

ership of the property. In short, Joseph Parker Wickham did not hold seisin of Robins Island.

RIPF's reliance on *Van Rensselaer v. Kearney*, 52 U.S. (11 How.) 313 (1850), and *Vanderheyden v. Crandall*, 2 Denio 9 (N.Y. Sup. Ct. 1849), is not to the contrary. These cases involved the practical difficulties in construing the effect of the Acts on a devise of an estate tail which took effect after the estate tail was abolished. Both courts and commentators interpreted the Acts as establishing a "first taker" rule. Under this rule, any grant or devise to an individual "and the heirs of his body," which took effect after the 1782 Act, conveyed title in fee simple to the named individual—the first taker. *See* Reeves, at 617-618 (1909) ("New York . . . abolished the fee tail by making it a fee simple in the first taker."). *Van Rensselaer v. Kearney* and *Vanderheyden v. Crandall* considered the peculiar difficulty in construing the first taker rule when the would-be first taker of a remainder in fee tail which was to follow a life estate, died while the life estate was still running. *See, e.g., Van Rensselaer v. Kearney*, 52 U.S. 313 (construing a devise to A for use during A's natural life followed by a remainder in fee tail to A's first son, where A's son died during A's lifetime); *Vanderheyden v. Crandall*, 2 Denio 9 (construing a devise in trust for the life of A, remainder in fee tail to the first son of A where the first son died during A's lifetime). In such cases, courts construed the Acts broadly and held that because the first taker's fee tail remainder vested upon his birth as the first son, the heir had "legal or equitable seisin" even though he died before taking possession of the land. As a result, a holder of a remainder in fee tail was deemed "seized of an estate in fee tail" for the purposes of the 1782 and 1786 Acts to Abolish Entails. *See Vanderheyden v. Crandall*, 2 Denio at 24 ("The remainder in fee tail had vested

in [the remainderman] and he was therefore seized of it" creating an interest which was "changed to a fee simple."); *accord Van Rensselaer v. Kearney*, 52 U.S. at 334-36 (holding same).

No intricate first taker problem is involved, however, in the case of Robins Island. As an estate already existing in fee tail when the 1782 Act to Abolish Entails was promulgated, seisin lay in the title holder—New York.

This result is not contrary to the settled doctrine expounded by learned commentators, such as Justice Story, that an attainder did not in and of itself disentail the attainted individuals heirs. The future interest of Joseph Parker Wickham was not confiscated by any punitive measure directed at his father. Rather, it was extinguished as part of land reform legislation of general applicability which reached and removed the future interests of *all* issue in tail and vested a fee simple in the tenant in tail without regard to that party's identity.

We therefore hold that by operation of the Act to Abolish Entails of 1782, Joseph Parker Wickham's future interest in Robins Island was extinguished. We address, however, the alternative holding of the district court that this claim is time-barred.

III. *Time Bars*

We are presented with no information explaining the failure of Parker Wickham's heirs to bring this claim earlier. It is undisputed that Joseph Parker Wickham returned to Southold in 1791 and purchased a farm on which he spent the remainder of his life. *See* Holbrook, at 114. Yet, there is no evidence that Joseph Parker Wickham prosecuted his claim to Robins Island or to the other land formerly contained in his father's estate. Indeed, there is no

evidence that any of the Wickham heirs, many of whom continued to live on Long Island, have sought, before now, a declaration of title to Robins Island.

RIPF does not attempt to excuse this delay, but argues that a claim by a loyalist heir is timely, regardless of the passage of centuries. In support of this claim, RIPF resorts to language in the Treaty of 1783 which it maintains gives rise to a "treaty-based" cause of action. Specifically, RIPF contends that Article Five, paragraph 2 of the Treaty of 1783, which provides that the claims of dispossessed loyalists and British subjects shall meet with "no lawful impediment" suspends the operation of any and all time bars on causes of action arising from wartime confiscations of property. RIPF further argues that as to British subjects, this suspension of all time-bars was confirmed by Article Nine of the Jay Treaty of 1794. In essence, RIPF contends that the Treaty of 1783 created a right of action in perpetuity for descendants of dispossessed loyalists. We disagree.

a. *The Treaty of 1783 and the Jay Treaty of 1794*

We find no logic in the proposition that Great Britain and the United States bargained for and created a right of action that would survive the inaction of the aggrieved parties and their heirs over a period of centuries. RIPF's interpretation of the Treaty of 1783 and the Jay Treaty of 1794 would require that even in the face of deliberate waiver by generation after generation of heirs and successors-in-interest, a holder of property might still be stripped of title on the basis of an ancient wrong. This plainly was not the intent of Article Five, paragraph 2 of the Treaty of 1783.

There is nothing in the historical record or cases cited by RIPF that indicates the signatories to the Treaty of 1783 intended to give loyalists and British property holders more than they would have had if there had been no war. Rather, it was the intent of the United States and Great Britain to remove those state-created obstacles, targeted at loyalists and British subjects, which prevented these individuals from having a fair opportunity to present their claims for restitution.

Within the context of the period, it is clear that even after the signing of the Treaty of 1783, British subjects and heirs to dispossessed loyalists continued to be stripped of property rights. *See, e.g., Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 379, 391-92 (1813) (invalidating confiscation by Virginia where under state statute at issue, title could not vest until after Treaty of 1783). In addition, such individuals were prevented from litigating their claims in American courts. Loyalists attainted under the 1779 Act of Attainder were "declared to be forever banished from this State" and upon being found in New York, would be "hereby adjudged and declared guilty of felony, and . . . suffer death as in cases of felony, without benefit of clergy." Act of Attainder of Oct. 22, 1779, 1779 N.Y. Laws, 3 Sess. ch. 25 at art. 2. Furthermore, as "aliens," British subjects were not permitted to maintain suit in American courts. It was these state-created "impediments" and the continuing sequestration of loyalist and British property, which were removed by the Treaty of 1783.

Furthermore, it was the refusal of some states to comply with the Treaty of 1783 which instigated the crisis resulting in the enactment of the Jay Treaty of 1794. This treaty addressed itself toward normalizing relations between the United States and Great Britain by recog-

nizing the right of British subjects to own property in this country and to bring their grievances to American courts. *See, e.g., Harden v. Fisher*, 14 U.S. (1 Wheat.) 139 (1816) (interpreting Article Nine of the Jay Treaty of 1794 as creating an exception for British subjects to the bar on suits by aliens). In light of these facts, it is a misconstruction of the Treaty of 1783 to argue, as RIPF attempts, that it created a privileged class of plaintiffs who are not subject to any state statute of limitations or the doctrine of laches.

We note that if it were proved that a loyalist heir was being unjustly prevented by a state from bringing his claim to court, a statute of limitations would properly be tolled during the period in which the impediment existed. *See, e.g., Hopkirk v. Bell*, 7 U.S. (3 Cranch) 272 (1806). It is, however, beyond reason to conclude that in the absence of evidence of such state-created "impediments" a plaintiff may simply disregard the statutes and doctrines which apply equally to all individuals seeking to recover land.

Carver v. Jackson, relied upon by RIPF, is not to the contrary. The plaintiff in *Carver* was the grantee of the children whose vested remainder in the property predated the 1779 attainder of their parents by New York's Act of Attainder of 1779. Because the parents had held a life estate in the property at the time their land was confiscated, the children's right to possession did not accrue until the death of both parents. The grantee commenced an action in ejectment in 1828, three years after the death of the surviving parent in 1825. Although forty-six years passed between the confiscation of the land in 1779 and the initiation of the suit in 1825, the grantee brought this action well within the statute of limitations once his right of possession accrued. There is no indication that *Carver*

supports plaintiff's contention that any action arising out of the confiscation of loyalist land can meet no time bar.

RIPF's reliance at oral argument on the disposition of the Philipse estate is similarly misplaced. In 1912, the State of New York authorized an acquisition of title to land formerly held by Philip Philipse, which had been confiscated in the Act of Attainder of 1779. *See* Act of April 18, 1912, 1912 N.Y. Laws, ch. 509. Clearly, this Court is not bound by the decisions of New York to repurchase previously-confiscated land or by the reasons the state has for so doing. Moreover, we note that the Philipse claim has been well-documented and repeatedly pressed by that family beginning with an appeal to the Royal Commission of Enquiry established by the Crown in 1784 to hear loyalist complaints. *See* Robert A. East & Jacob Judd eds., *The Loyalist Americans* 95 App. (1975).

Finding no support for RIPF's claim that a cause of action was preserved in perpetuity by either the Treaty of 1783, or the Jay Treaty of 1794, we consider the district court's application of New York's Statute of Limitation and the doctrine of laches to bar this claim.

b. *Statute of Limitations*

In choosing an applicable statute of limitations, the district court noted that either of two statutes of limitations might be appropriate. First, third-party defendant New York argued that a claim arising out of attainder during the American Revolution is barred by an enactment of the New York State Legislature which mandated that all such claims be brought no later than five years from March 28, 1797. *See Robins Island*, 755 F. Supp. at 1193. In the alternative, SDC offered the ten-year period of limitation provided by modern New York law in actions to compel

the determination of a claim to real property. *See* N.Y. Real Prop. Acts § 1501 *et seq.* (McKinney 1979); N.Y. Civ. Prac. L. & R. § 212(a) (McKinney 1990); *Downes v. Peluso*, 115 A.D.2d 454, 495 N.Y.S.2d 691, 692 (2d Dep't 1985). The district court did not resolve the issue, noting that under either statute of limitations, this claim could have accrued no later than at the death of Parker Wickham on May 22, 1785, and is therefore time-barred. *Robins Island*, 755 F. Supp. at 1191-92.

Indeed, we are unaware of any statute of limitations which would provide for a two-century old action for title and possession in real property. Accordingly, we hold that this cause of action is barred as untimely. Additionally, we find that this case is barred by the equitable doctrine of laches.

c. *Laches*

"[T]he existence of laches is a question primarily addressed to the discretion of the trial court," which must consider the "equities of the parties." *Gardner v. Panama R.R. Co.*, 342 U.S. 29, 30-31 (1951) (per curiam). Generally, laches is applied where it is clear that a plaintiff unreasonably delayed in initiating an action and a defendant was prejudiced by the delay. *See Stone v. Williams*, 873 F.2d 620, 623 (2d Cir.), *cert. denied*, 493 U.S. 959, *vacated on other grounds*, 891 F.2d 401 (2d Cir. 1989); *In re Centric Corp.*, 901 F.2d 1514, 1519 (10th Cir.), *cert. denied*, 111 S. Ct. 145 (1990). We agree with the district court's determination that although laches is traditionally an equitable defense, the doctrine is particularly applicable to ancient land claims which do not implicate broader federal policy. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 261-73 (1985) (Stevens, *J.*, dissenting); *see also*, *id.* at 244-45, n. 16 (majority) (sug-

gesting the application of laches to bar claims by Native Americans is inconsistent with federal policy on such claims). Since we are aware of no federal jurisprudence which precludes the application of an equitable time-bar to cases arising out of New York's Act of Attainder of 1779, we consider its application here.

In considering the reasonableness of the delay, we are not unmindful of the hostility with which such an action might have been met in the late eighteenth century. We also note, that had we then heard such a case, we may have been forced to decide whether a small delay was reasonable because of the confusion surrounding the rights of loyalist heirs during this period. However, we are not called upon to decide such a difficult question here.

It is 1992, and two centuries have passed since Joseph Parker Wickham's right to possession of the premises accrued. Yet, Joseph Parker Wickham and his heirs remained on Long Island from 1791 until the present, witnessing the reaffirmation of the Treaty of 1783 in the Jay Treaty of 1794 and the Supreme Court's highly publicized decisions sustaining the rights of British and loyalist heirs unlawfully dispossessed of their lands, but did nothing. In considering the unreasonableness of the delay, it requires no strenuous debate to conclude that two centuries is too long.

We next consider whether SDC was prejudiced by the delay. A defendant may suffer prejudice either because it would be inequitable, in light of a change in defendant's position, to allow plaintiff's claim to proceed or because the delay makes it difficult to garner evidence to vindicate his or her rights. *See Stone*, 873 F.2d at 625. Both types of prejudice are present here.

It is unlikely that SDC would have purchased the property had it known its title was in dispute. SDC's plans for Robins Island's use, as well as those of SDC's predecessors-in-interest, were premised on the assumption that chain of title was, for almost two hundred years, quiet and complete as recorded. This assumption was not unreasonable. There must arrive a point at which title to land is settled. Overturning a two hundred year old chain of title would result in gross prejudice to SDC and the other successors-in-interest to the remainder of Joseph Parker Wickham's confiscated estate.

Furthermore, it is impossible for SDC to obtain witnesses or marshal evidence to support its contentions that Joseph Parker Wickham relinquished his claim. SDC attempted to argue that Joseph Parker Wickham accepted a payment from the British government with the intention of releasing his claim to Robins Island and that there was no impediment to the prosecution of this claim during Joseph Parker Wickham's lifetime. Neither Joseph Parker Wickham nor anyone else alive at the time is here to support or refute these claims. Nor can anyone describe with certainty what happened to the Wickham estate in the years following the American Revolution. It can just as easily be asserted that Joseph Parker Wickham accepted 2,800 pounds sterling from Great Britain in satisfaction of a claim to the island or that he intentionally waived claim to the estate of his father than that he was unfairly prevented from maintaining a suit. In short, the enormous lapse of time makes it impossible to know whether title would have changed hands if this action had been timely brought. It is because this case turns on an interpretation of ancient and unascertainable facts that the law favors repose.

Having found unreasonable delay and prejudice, we find this cause of action in ejectment to be barred by the doctrine of laches. In applying the doctrine of laches to Wickham's claim for the recovery of Robins Island, we wish to be clear that we do not consider whether laches may apply to bar a treaty-based cause of action. Rather, it is because the Treaty of 1783 and the Jay Treaty of 1794 neither created a right to recovery nor extended indefinitely any right which may have already existed, that we find this action is time-barred.

Reason tells us that a claim to property long unprosecuted is lost. Whatever else we can surmise from the historical record, it is clear that even if Joseph Parker Wickham had a right to title in Robins Island, he and his heirs slept on this right for over two centuries. If the price of liberty is eternal vigilance, then it is little to ask that the price of property be a small portion of the same.

CONCLUSION

We have examined each of RIPF's remaining contentions and find them to be without merit. Accordingly, we affirm the judgment of the district court granting SDC's motion for summary judgment.

ROBINS ISLAND PRESERVATION FUND, INC., Plaintiff,

v.

SOUTHOLD DEVELOPMENT CORP., Defendant.

SOUTHOLD DEVELOPMENT CORP., Third-Party Plaintiff,

v.

STATE OF NEW YORK, Third-Party Defendant.

No. CV 89-1299.

United States District Court, E.D. New York.

Feb. 1, 1991.

MEMORANDUM AND ORDER

WEXLER, District Judge.

In the above-referenced action, Robins Island Preservation Fund, Inc. ("plaintiff") seeks, *inter alia*, a declaration regarding ownership interest and possessory rights in Robins Island, an island of approximately 445 acres located in the Peconic Bay in Suffolk County, New York. Briefly stated, plaintiff's claim is premised on the argu-

ment that New York State, in violation of certain national treaties, improperly confiscated Robins Island in 1779 from plaintiff's alleged predecessors-in-interest. Plaintiff, a not-for-profit Delaware corporation with its principal place of business in Maryland, thus claims present ownership to more than seventy percent of Robins Island. Named as defendant is Southold Development Corporation ("defendant"), a New York corporation which currently holds title to Robins Island. In addition, a third-party complaint naming the State of New York, ("the State"), has been filed in the action. Currently before the Court are defendant's and plaintiff's cross-motions for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Proced[illegible]e. In addition, defendant alternatively se[illegible]ks dismissal, pursuant to Rule 12(b)(7[illegible] of the Federal Rules of Civil Procedure, for failure to join necessary and indispensable parties. The State, as third-party defendant, also moves for various relief, including *inter alia*, dismissal of the complaint and summary judgment. After a brief statement of the relevant background facts, the Court will turn to address the parties' mo-

tions, beginning with the motions for summary judgment made by defendant and the State.

I. BACKGROUND

According to the complaint, one Joseph Wickham purchased Robins Island in 1715. In 1734, he devised the property to his son Joseph "and to the male heirs of his body lawfully begotten or to be begotten forever." Complaint at para. 9. Such a devise created an "estate tail" in Robins Island whereby Joseph Wickham II held the fee interest in the property for his life, and upon his death the fee interest would belong to his eldest son. In other words, from generation to generation, Robins Island would be perpetually inherited by the eldest son in direct descent from Joseph Wickham, Sr. In fact, upon the death of Joseph Wickham II in 1749, his eldest son, Parker Wickham, obtained the estate tail interest in Robins Island.

On October 22, 1779, at a time during the Revolutionary War when British forces occupied Long Island, the State of New York passed the Act of Attainder. That act de-

clared Parker Wickham, among others, convicted of treason, and further declared that all property owned by those named was forfeited to, and vested in, the people of the State of New York. Prior to the confiscation, as noted above, Parker Wickham possessed a "fee tail" estate to various holdings in Suffolk County, including Robins Island. Plaintiff contests the validity of the State's confiscation of Robins Island in 1779, and argues that in any event the 1779 Act of Attainder did not affect any estate or interest held by Parker Wickham's eldest son at the time. *See* Complaint at para. 13. More particularly, as to the former point, plaintiff argues that at the time of the State's 1779 Attainder Act, ("the Attainder"), British forces occupied and maintained control over New York City and Long Island. *See* Plaintiff's Memo at 5. Consequently, plaintiff asserts that New York exercised no sovereignty over Long Island during the period, and therefore state law had no force or effect. *Id.* As to the latter point noted above, plaintiff argues that even if the Attainder was valid to confiscate Robins Island, the future possessory interest of Parker Wickham's son remained valid because the Attainder only

sought to confiscate the interest of the individuals specifically named in the statute.

Many of the historical facts are not in dispute, although there is strong disagreement between the parties as to their interpretation. At any rate, in 1782, New York State abolished fee tail estate interests in land, and upon enactment of that same legislation, converted those estates to fee simple estates. In addition, in late 1782 the United States entered into a Provisional Treaty of Peace with Great Britain, ("the 1783 Treaty"), which was executed in 1783. According to the complaint, a portion of the 1783 Treaty was intended to restore all confiscated "Estates, Rights and Properties" to, *inter alia*, "real British subjects." Plaintiff further points out that Article V of the 1783 Treaty provided that persons with any interest in confiscated lands "shall meet with no lawful impediment in the prosecution of their just rights." Complaint at para. 16. Furthermore, Article VI of the Treaty prohibited future confiscations of property. *Id.*

In May of 1784, the legislature of the State of New York passed an Act for the

speedy sale of confiscated estates, which confirmed the confiscations authorized by the Attainder and provided procedures for expediting the sale of those confiscated estates. Thereafter, in August of 1784, the Commissioners of Forfeiture of the State of New York conveyed Robins Island in fee simple to Benjamin Tallmedge and Caleb Brewster. *See* Plaintiff's Affirmation at exhibit 2. According to the complaint, defendant in the action at bar holds title to Robins Island based on a chain of title which commenced with that 1784 conveyance.

As noted above, one of plaintiff's theories is based upon the argument that New York exercised no sovereignty over Long Island at the time of the Attainder, and thus it had no lawful effect over the area. The crux of plaintiff's alternative theory, based on, *inter alia*, clauses cited above from the 1783 Treaty, as well as identical language drafted into the final Definitive Treaty of Peace with Great Britain, is that the 1784 conveyance of Robins Island by the state was void. More specifically, plaintiff argues that the Attainder confiscated a mere life interest held by Parker

Wickham. Thus, plaintiff claims that Parker Wickham's son *retained* his vested possessory fee tail estate as of the time of the confiscation. Furthermore, plaintiff asserts that because New York had abolished fee tails in the interim, when Parker Wickham died in 1785 his son held the exclusive right to the fee simple of Robins Island. As alleged successors-in-interest to Parker Wickham's son, plaintiff claims the right to current possession of Robins Island.

By way of clarification, plaintiff is a corporation which apparently has obtained quit claim deeds from various individuals who claim to be heirs of Parker Wickham. All told, the collection of alleged interests is asserted to comprise an approximate 75% undivided interest in Robins Island. Plaintiff thereby seeks a declaration that it is the owner of its claimed interest, and seeks, *inter alia*, that this Court grant it immediate possession, in addition to an award of fair rental value during the period of defendant's use and occupancy of Robins Island.

In response to the complaint, defendant points out that title to Robins Island has

remained stable for over two hundred years, and that plaintiff's action destabilizes the title to all land formerly owned by Parker Wickham, including parts of the Towns of Southold, Riverhead and Southampton, New York. Among the affirmative defenses asserted by defendant are, *inter alia:* (1) that plaintiff has failed to name indispensable parties; (2) that the action is barred by the statute of limitations; and (3) that through adverse possession title has been acquired by defendant and its predecessors. As noted above, plaintiff and defendant move for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. In addition to defendant's Rule 56 motion, which seeks dismissal of the complaint, the State moves for various alternative relief, including dismissal of the complaint, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and summary judgment. Aside from asserting the statute of limitations as a time bar, a defense also raised by defendant, the State additionally asserts that plaintiff's causes of action are barred by the doctrine of laches.

II. DISCUSSION

Given the unique nature of this case, and the lengthy arguments made by the parties in their papers, the Court will address only the issues which it considers to be dispositive of the motions. Accordingly, for the reasons set forth below, the Court finds that defendant's and the State's motions for summary judgment must be granted. By way of an outline, the Court will address the following points in the following sequence: (A) New York's Act of Attainder of 1779 was validly exercised over Parker Wickham, and at the time New York conveyed Robins Island in 1784, it held a fee simple absolute interest in the premises; therefore, the Court finds that plaintiff has no claim under the 1783 Treaty, and that there is no federal question jurisdiction over this case. (B) Pursuant to the Court's diversity jurisdiction, the substantive law of New York would apply, and therefore, based on both Supreme Court precedent and New York law, the Attainder was valid. However, even if the Court were to find that the Act of Attainder was not

valid, application of the state statute of limitations would bar plaintiff's claim. (C) Even assuming, *arguendo*, that Joseph Wickham did retain some future interest in Robins Island, the equitable doctrine of laches bars plaintiff's claim. Moreover, even if the Court were to find that application of a state-law time bar was inappropriate, public policy demands that plaintiff's claim cannot exist in perpetuity and unsettle title to real property in New York.

For each of the points made below, the Court emphasizes that the summary judgment standard of Rule 56(c) of the Federal Rules of Civil Procedure controls. Accordingly, it is to be noted that a motion for summary judgment may be granted only when it is shown that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552–53, 91 L.Ed.2d 265 (1986); *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir.1987); *Winant v. Carefree Pools*, 709 F.Supp. 57,

59 (E.D.N.Y.), *aff'd*, 891 F.2d 278 (2d Cir. 1989). The burden on such a motion is upon the moving party to clearly establish the absence of a genuine issue as to any material fact. *Donahue*, 834 F.2d at 57. In addition, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *Id.* With these principles in mind, the Court notes that many of the factual issues raised by the parties herein involve questions regarding the interpretation of both historical documents and historical events. Therefore, in light of the fact that this case poses a number of mixed issues of law and fact, albeit ancient fact, and given that no one involved in this case has any personal knowledge of the great majority of the facts, the Court views this case as one particularly well-suited to disposition by motions. Consequently, in consideration of all the documentation submitted by the parties, the Court finds as follows.

A. *Validity of New York's Act of Attainder*

[1] As noted above, plaintiff asserts that the Attainder had no lawful effect on Parker Wickham's interest in Robins Island, since the British forces allegedly occupied the Long Island area at the time of the Attainder. *See* Plaintiff's Memo. at 4–6. However, the cases relied upon by plaintiff to support this proposition are far outweighed by the Supreme Court cases cited by defendant and the State, which stand for the proposition that an act taken by a state after July of 1776 was an act taken by a sovereign and independent government. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224–25, 1 L.Ed. 568 (1796); *M'Ilvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209, 212, 2 L.Ed. 598 (1808). It is of particular significance that the court in *Ware* upheld a Virginia forfeiture statute, adopted prior to the Articles of Confederation, which confiscated certain British property within Virginia. *See* 3 U.S. (3 Dall.) at 222, 225.

In addition to the United States Supreme

Court precedent noted above, the State cites, *inter alia*, *McGregor v. Comstock*, 16 Barb. 427 (1853), *aff'd*, 17 N.Y. 162 (1858), to support the proposition that the courts of New York have consistently upheld the various provisions of the Attainder. *See* New York State's Memo. in Opposition at 3–6, 8, and cases cited therein. Plaintiff does not sufficiently raise a genuine issue so as to dissuade this Court from the belief that *McGregor* illustrates that New York courts have upheld the validity of the Attainder. *See McGregor*, 16 Barb. at 434.

Plaintiff's reliance on *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936) is misplaced. In *Curtiss-Wright* the court held that, both prior to and following the Declaration of Independence, the individual states "never possessed *international* powers," and thereby specifically addressed the limited power of the individual states as respecting foreign affairs. *Id.* at 316, 57 S.Ct. at 219 (emphasis added). Such a ruling does nothing to impact the earlier Supreme Court

precedent which clearly held that the states, after the adoption of their respective constitutions and before the ratification of the United States Constitution,[1] had the sovereignty and authority to create such laws as effected property within their bounds. *Ware*, 3 U.S. (3 Dall.) at 223–24. Therefore, in spite of the British occupation, this Court finds that New York's Act of Attainder in 1779 was valid as respecting Robins Island. *See id.*

In addition, plaintiff's reliance on *United States v. Rice*, 17 U.S. (4 Wheat.) 246, 4 L.Ed. 562 (1819), is of no avail. In *Rice*, the Court held that goods imported in 1814 to a British-controlled port in Maine, during the hostilities of the War of 1812, could not subsequently be made liable for taxes pursuant to the United States revenue laws. *Id.* at 253. However, *Rice* dealt with the imposition of a federally created tax on goods, and cannot be logically extended to support the proposition that a *state* could

1. It is to be noted that New York State's Constitution was enacted in 1777, *prior* to the 1779 Act of Attainder.

not legislate valid laws governing property within its borders during a period of occupation. In fact, no case cited by plaintiff directly held New York's 1779 Act of Attainder to have been unlawful.

Harden v. Fisher, 14 U.S. (1 Wheat.) 300, 4 L.Ed. 96 (1816), cited by both parties, dealt with issues regarding the Attainder, but ultimately approved of the confiscation of property, and never found the Attainder to have been illegal or improper. In addition, neither *Inglis v. The Trustees of the Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 7 L.Ed. 617 (1830), nor *Carver v. Jackson*, 29 U.S. (4 Pet.) 1, 7 L.Ed. 761 (1830) found the Attainder to be invalid. Rather, as noted above, Supreme Court precedent supports the proposition that the Attainder was valid.

This Court further notes that the 1783 Treaty of Peace itself appears to have recognized the valid confiscation of property, owned by either British subjects or loyalists, by the individual states, regardless of whether a region was controlled by the British. Indeed, Article V of the 1783

Treaty specifically provided that:

> It is agreed that the Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the Restitution of all Estates, Rights, and Properties which have been confiscated, belonging to real British Subjects; and also of the Estates, Rights and Properties of Persons resident in Districts in the Possession of his Majesty's Arms....

Treaty of Peace, Nov. 30, 1782—August 6, 1783, United States—Great Britain, at Article V. Therefore, the very Treaty which plaintiff argues was violated by the confiscation and subsequent sale of Robins Island acknowledged the authority of the states to confiscate property, and merely recommended to the states that restitution be provided. *See also Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453, 463, 4 L.Ed. 613 (1819).

[2] Having established the absence of a genuine issue of fact as to the validity of the Attainder, the next issue to be addressed concerns the circumstances of the sale of Robins Island by the State to Benja-

min Tallmedge and Caleb Brewster in 1784. Plaintiff argues that even where the Attainder validly confiscated Parker Wickham's interest, Parker Wickham's son Joseph retained a future interest which was allegedly unaffected by the Attainder. However, based on the submissions of the parties, this Court disagrees.

As discussed above, in 1779 New York's Act of Attainder confiscated Parker Wickham's interest in Robins Island. The next relevant event, which is apparently undisputed by the parties, was New York's abolishment of the fee tail interest in real property. It bears repeating to note that Parker Wickham's interest in Robins Island at the time of the Attainder was a fee tail. *See supra* page 1186. It is plaintiff's contention that the Attainder was limited in scope to Parker Wickham, and that therefore any further interest held by another party was not destroyed by the confiscation. *See* Plaintiff's Memo at 17–21. Thus, plaintiff asserts that when Parker Wickham died in 1785, his son Joseph Wickham became vested with a fee simple inter-

est. *Id.* at 13. According to plaintiff, any other interpretation would be violative of the prohibition against "future confiscations" in the 1783 Treaty of Peace. Although defendant argues that, pursuant to the Attainder legislation, the people of the State of New York were seized with a fee simple absolute estate in Robins Island, *see* Defendant's Memo. in Opposition at 16, even if the Attainder only confiscated the "fee tail" estate of Parker Wickham, for the reasons stated below any possible interest of Joseph Wickham was ultimately extinguished.

In 1782, after New York confiscated the property, it enacted legislation which abolished fee tail estates, and simultaneously converted them to fee simple estates. Act of July 12, 1782, N.Y.Laws, 6 Sess., ch. 2 (reproduced at *id.*, exhibit 2). As plaintiff apparently concedes, the 1782 Act made no provision for any future possessory interests, and it would defeat the purpose of the legislation to find anything other than that future interests under the fee tails were extinguished. Thus, it appears to this

Court that New York, which had confiscated Robins Island pursuant to the Attainder, and thereby held ownership to Robins Island at the time of the 1782 Act, became vested with a fee simple estate. Consequently, when New York later sold the property in 1784, it conveyed a fee simple absolute interest. It is to be noted that Parker Wickham died in 1785, and although plaintiff argues that Joseph Wickham was entitled to the property at that point, based on the chronology of the various legislation this Court agrees with the State that Joseph Wickham's interest was extinguished by the law abolishing fee tails. *See* New York State Memo in Opposition at 10. As the State points out, plaintiff's reliance on the New York case of *Wendell v. Crandall*, 1 N.Y. 491 (1848), is misplaced since that case involved the interpretation of a later statute.[2]

2. Plaintiff does not contest that the later statute of 1786 utilized in the *Wendell* case actually provided that conveyances made pursuant to the 1782 Act would remain in effect. *See* New York State Memo in Opposition at 11.

Overall, in consideration of the papers and authorities submitted by the parties, the Court finds that there does not exist a genuine issue of material fact as to the validity of the Attainder and the subsequent sale of Robins Island to Tallmedge and Brewster in 1784. *See* Fed.R.Civ.P. 56(c); *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552–53. In addition, as noted above, plaintiff's argument that the 1784 sale violated the provision of the 1783 Treaty of Peace which forbade "future confiscations," is rejected since Joseph Wickham's interest was extinguished, at the latest, by the time of the 1782 Act abolishing fee tails. *See* Act of July 12, 1782, N.Y.Laws, 6 Sess., ch. 2 (wherein tenants holding title in a fee tail estate were deemed to hold in fee simple). Thus, based on the above reasons the Court finds that plaintiff's claim is without merit. Having made such a determination, it is to be noted that plaintiff does not overcome defendant's reliance on the assertion by the United States Department of State that the provisions in Articles 4–7 and 10 of the 1783 Treaty have

expired, and are of no force and effect. *See* Defendant's Memo. at 9–10. However, as explained below, even if the Court were to find merit in the claim, New York's statute of limitations renders the action time-barred.

B. *Statute of Limitations*

[3] The Supreme Court has established that where Congress has not provided a federal statute of limitations governing an action, federal courts must apply the most appropriate state statute of limitations. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975) (citations omitted); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367, 97 S.Ct. 2447, 1254–55, 53 L.Ed.2d 402 (1977) (citations omitted); *see also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240–41, 105 S.Ct. 1245, 1254–55, 84 L.Ed.2d 169 (1984). Plaintiff argues that application of a state law statute of limitations in this case would be violative of the 1783 Treaty of Peace, and thereby violative of the Supremacy Clause

in the United States Constitution. U.S. Const. art. VI, cl. 2. However, such an argument presupposes that the 1783 Treaty itself contemplated eternal preservation of land claims by parties who are neither British subjects, nor individuals personally seized of any real property interest within their lifetime. For the reasons stated below, the Court finds that plaintiff's is an untenable position.

Plaintiff asserts that its claim is a treaty-based one, and therefore not subject to time bar defenses. *See* Plaintiff's Memo. at 33–39. However, as discussed above, plaintiff has no direct cause of action based on New York State's violation of the 1783 Treaty of Peace. Since plaintiff additionally pleads diversity jurisdiction pursuant to 28 U.S.C. § 1332, and since this case is wholly concerned with title to real property in New York State, *see e.g., El Cid Ltd. v. New Jersey Zinc Co.*, 575 F.Supp. 1513 (S.D.N.Y.1983), *aff'd*, 770 F.2d 157 (2d Cir.), *cert. denied*, 474 U.S. 1021, 106 S.Ct. 573, 88 L.Ed.2d 557 (1985), this Court finds that application of New York law regarding the

state statute of limitations is proper.

Firstly, it is not the Court's view that the 1783 Treaty of Peace contemplated a scenario such as the one presented in the case at bar. Although the Treaty did provide that persons with an interest in any confiscated lands would "meet with no lawful Impediment" in pursuing their claims, in this instance the lawful impediment is not being asserted against Joseph Wickham, or any other "British Subjects" in the words of the Treaty, but against a Delaware corporation 207 years later. A reasonable interpretation of the "no lawful impediments" phrase would not support the theory that the drafters of the Treaty actually intended that a claimed heir or assignee would remain immune from the countless other state laws which have been enacted, and therefore the Court finds that application of the New York statute of limitations is appropriate.

Secondly, the Court finds plaintiff's reliance on *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1984), to be mis-

placed. In *Oneida*, the Supreme Court rejected application of a statute of limitations defense to Indian land claims which accrued in 1795. *Id.* at 240–41, 105 S.Ct. at 1254–55. However, the *Oneida* court repeatedly emphasized the special nature of Indian claims, and noted that the Court had always "recognized the aboriginal rights of the Indians to their lands." *Id.* at 235, 105 S.Ct. at 1251. Moreover, the Court discussed in detail the unique federal jurisprudence which had developed with respect to Indian claims since prior to the Revolutionary War, *id.* at 233–36, 105 S.Ct. at 1250–52, and, in acknowledging Congressional intent and judicial precedent, ruled that the Oneidas cause of action was based on federal common law. *Id.* at 236, 105 S.Ct. at 1252. Moreover, federal statutes which specifically addressed actions brought by Indians with respect to property further supported the Court's decision. *Id.* at 240–44, 105 S.Ct. at 1254–56. Thus, the Court found that "the borrowing of a statute of limitations period in these cases would be inconsistent with federal policy." *Id.* at

241, 105 S.Ct. at 1255.[3] With respect to the case at bar, plaintiff has shown no established federal policy, under judicial precedent or Congressional intent, which would call for a similar result. Accordingly, *Oneida* is of no avail to plaintiff. *See generally*, New York State Memo in Opposition at 8–9.

In addition, plaintiff's reliance on *Karnuth v. United States*, 279 U.S. 231, 49 S.Ct. 274, 73 L.Ed. 677 (1929) is misplaced. *Karnuth* does not stand for the proposition that there can be no statute of limitations imposed on actions allegedly arising out of the Treaty of Peace, nor does *Society for the Propagation of the Gospel v. New*

3. It is to be noted that the *Oneida* Court did not squarely address the doctrine of laches as a bar to the claims presented therein, *Oneida*, 470 U.S. at 244–45, 105 S.Ct. at 1256–57, although the majority indicated its belief that laches was inapplicable. *Id.* at n. 16. *But see, id.* at 255–73, 105 S.Ct. at 1262–72 (Stevens, J., dissenting) (supporting the application of a time bar to the claims).

Haven, 21 U.S. (8 Wheat.) 464, 5 L.Ed. 662 (1823). The facts of the *Society* case, aside from the fact that they were being addressed within thirty years of the date of the confiscation, arose out of a confiscation of British-owned property which took place in 1794, eleven years *after* the Treaty of Peace prohibited "future confiscations." *Id.* at 490. In short, no cases cited by plaintiff persuade this Court that a time-bar cannot be applied to this action, were it even established that a valid cause of action existed.

[4] That being the case, defendant urges that the appropriate analogous cause of action under state law from which to discern the proper limitation is found in Article 15 of the New York State Real Property Actions and Proceedings Law, ("RPAPL"). N.Y. Real Prop. Acts § 1501 *et seq.* (McKinney 1979). That statute provides for an action to compel the determination of a claim to real property. *Id.* It has been held that actions brought pursuant to Article 15 of the RPAPL are subject

to a ten-year statute of limitations. *See* N.Y.Civ.Prac.L. & R. § 212(a) (McKinney 1990); *Downes v. Peluso*, 115 A.D.2d 454, 495 N.Y.S.2d 691, 692 (2d Dep't 1985). On the other hand, the state suggests that the appropriate statute of limitations was provided by the New York legislature in an Act of 1797, which indicated that any person or entity having a claim for land forfeited to the state due to attainder would have five years from the date of March 28, 1797 to bring an action. *See* State of New York's Memo at 3–4. However, even allowing for the greater ten-year period, it remains inescapably clear that plaintiff's action is time-barred.

[5] A federal claim "accrues when the plaintiff 'knows or has reason to know' of the injury that is the basis of his action." *Pauk v. Board of Trustees*, 654 F.2d 856, 869 (2d Cir.1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982). In the case at bar, the *latest* date by which plaintiff may be held to have learned of any possible claim was May 22, 1785, when

Parker Wickham died and his son Joseph could have argued a right to possession of Robins Island. *See* New York State's Memo at 6. Plaintiff claims that it is the direct successor-in-interest to Joseph Parker Wickham, and yet even utilizing a liberal approach to the accrual date, the action was brought 194 years too late. Thus, the Court holds that plaintiff's cause of action is barred by the ten-year statute of limitations as provided by New York law. *See Downes*, 495 N.Y.S.2d at 692.

However, even if the Court were to find the statute of limitations inapplicable, the equitable doctrine of laches, combined with and supported by public policy, would bar plaintiff's claim.

C. *Laches and Public Policy*

[6] The state argues that plaintiff's claims are barred by the doctrine of laches. *See* New York State's Memo at 8. Although, as discussed above, plaintiff asserts that there are no time-bar defenses to this action, and that application of such a

defense would be violative of both the separation of powers doctrine and the Supremacy Clause, this Court has already determined that application of a statute of limitations is proper and bars plaintiff's claims. However, separate and apart from the statute of limitations, this court finds that plaintiff's claims would be additionally barred by both laches and public policy. *See County of Oneida*, 470 U.S. at 261–73, 105 S.Ct. at 1265–72 (Stevens, J., dissenting) (wherein Justice Stevens offered a detailed explanation of, and approval to, application of the doctrine of laches to ancient land claims); *but see, id.* at 244–45, n. 16, 105 S.Ct. at 1256–57, n. 16 (suggesting that application of laches to bar *Indian* land claims is inappropriate) (citations omitted).

[7] The equitable doctrine of laches focuses on the inquiry of whether the plaintiff, in asserting its rights, was guilty of unreasonable delay which prejudiced the defendant. *See Gardner v. Panama R.R. Co.*, 342 U.S. 29, 31, 72 S.Ct. 12, 13–14, 96 L.Ed. 31 (1951) (citations omitted); *Lottie*

Joplin Thomas Trust v. Crown Publishers, Inc., 592 F.2d 651, 655 (2d Cir.1978); *Indep. Bankers Assoc. v. Heimann*, 627 F.2d 486, 488 (D.C.Cir.1980). Generally, even given a remarkable passage of time such as in the case at bar, "[l]ack of diligence, standing alone, is insufficient to support a claim of laches; the party asserting the claim also must establish that it was prejudiced by the delay." *Majorica, S.A. v. R.H. Macy & Co.*, 762 F.2d 7, 8 (2d Cir.1985) (citing *Costello v. United States*, 365 U.S. 265, 282, 81 S.Ct. 534, 543, 5 L.Ed.2d 551 (1961)); *see also* 30A C.J.S. *Equity* § 112 (1955).

In the case at bar, it is undisputed that plaintiff and its predecessor-in-interest have been out of possession of Robins Island, with knowledge of the fact, for over 200 years. It does not appear that there exists, and plaintiff does not offer, any excuse or explanation for the extraordinary delay in bringing this action. Moreover, defendants, dealing with every prior owner of the parcel, has relied on the time-honored

assumption that no valid claims existed on behalf of plaintiff. In fact, plaintiff's inexcusable delay helped form the basis of that assumption, and it is just such a scenario which gives rise to a charge of laches. *See Gardner*, 342 U.S. at 31, 72 S.Ct. at 13; *Costello*, 365 U.S. at 282, 81 S.Ct. at 543; *see also County of Oneida*, 470 U.S. at 256, 105 S.Ct. at 1263 (Stevens, J., dissenting in part).

Plaintiff does not challenge that defendant and its predecessors have paid the taxes and maintained the property for more than 200 years. It does not appear that plaintiff, or its predecessors-in-interest, commenced any action, or even raised any claim with the State, in that entire time. The approximately 204 year delay in commencing this action, from the 1784 conveyance by the state, now threatens to disrupt title to real estate in various parts of Long Island, aside from Robins Island, which in and of itself can be viewed as supporting a claim of laches. *See County of Oneida*, 470 U.S. at 256, 105 S.Ct. at 1263 (Stevens,

J., dissenting) (quoting a passage from *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477–78, 8 L.Ed. 195 (1831), which noted that "[t]he best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles."); *see also Lake Caryonah Im. Ass'n v. Pulte Home Corp.*, 903 F.2d 505, 508–09 (7th Cir.1990) (applying laches to bar a land claim where plaintiff's 11 year delay in bringing action caused prejudice by way of, *inter alia*, defendant having paid property taxes and insurance costs and maintained the property). For the same reasons, public policy would further support the application of laches herein.

The Court is mindful of plaintiff's stated purpose. It is worthy of mention that plaintiff asserts that aside from "rectify[ing] an historical injustice committed by the State of New York against Parker Wickham and his family," the present lawsuit is further based on important environmental concerns valued by the Peconic

community. *See* Plaintiff's Memo at 1. Furthermore, plaintiff asserts that it decided to take action when it appeared that Robins Island faced impending development by defendant. *Id.* at 1–2. Nevertheless, such goals, which may be seen as admirable, do not come close to justifying what appears to this Court to be an unprecedented period of delay. As Justice Stevens noted, dissenting in part in *County of Oneida:*

> Although the mere passage of time, without other inequity in the prosecution of the claim, does not support a finding of laches in the ordinary case, ... in cases

4. It is to be noted that the majority in *Oneida,* although suggesting that it would not apply laches to Indian land claims, *see* note 3 *supra,* did not directly address the issue. Furthermore, absent the stated importance and influence of longstanding federal policy regarding Indian claims, it does not appear that the majority in *Oneida* would have necessarily rejected application of the doctrine of laches in that case. *See* 470 U.S. at 244 n. 16, 105 S.Ct. at 1256–57 n. 16.

> of *gross* laches the passage of a great length of time creates a nearly insurmountable burden on the plaintiffs do disprove the obvious defense of laches.

470 U.S. at 266, 105 S.Ct. at 1268 (citations, footnote omitted).[4]

From another perspective, the Court rejects plaintiff's assertion that the Treaty of Peace would be violated, or improperly amended, by the imposition of a time-bar to the instant case. From the language of the Treaty itself, it does not appear that drafters intended parties in the position of Joseph Wickham, let alone their descendants, to retain claims in perpetuity. In fact, as discussed above, the Treaty provided that "Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the Restitution of all Estates, Rights, and Properties which have been confiscated, belonging to real British subjects." *See* Defendant's Notice of Motion at exhibit D. This Court agrees with defendant's assertion that such language, "recommending" restitution of confiscated

estates, illustrated a recognition by the creators of the Treaty that attainders were lawfully enacted. In other words, the Treaty itself indicated that the individual states were free to either restore the confiscated estates or not to do so. In fact, as noted above, New York subsequently rejected such a recommendation and passed an act for the speedy sale of the confiscated and forfeited estates. *See* 1784 N.Y. Laws ch. 64 (reproduced at Defendant's Notice of Motion at exhibit F). Therefore, the language of the Treaty itself, along with the subsequent legislation passed by New York State, support a finding that some type of time-bar is demanded, separate and apart from the persuasive public policy basis for doing so.

Lastly, the extended delay of this claim appears to have rendered the proof of any lingering questions of fact impossible. To cite but one example, defendant argues that Parker Wickham elected to receive compensation for his claim from the British government, rather than pursue any claim in the courts of the United States. *See*

Defendant's Memo at 30. Plaintiff more or less concedes that such an issue of fact now requires speculative arguments due to the passage of time. *See, e.g.*, Plaintiff's Memo at 63–64 (wherein plaintiff suggests that the compensation law "was passed out of moral considerations.") As a matter of equity, such issues cannot now be litigated where there has been an inexcusable and prolonged delay on the part of plaintiff.

For the reasons stated above, the Court holds that the doctrine of laches would act as a bar to all of plaintiff's clams, thus requiring the dismissal of the complaint.

CONCLUSION

As explained above, this Court finds that plaintiff has no claim based on the argument that New York's 1779 Act of Attainder was invalid as applied to Robins Island; additionally, there is no merit to plaintiff's claim based on its alleged position as successor-in-interest to Joseph Wickham, nor in the argument that the sale of Robins Island in 1784 violated the 1783 Treaty of

Peace. To this finding, the plaintiff has not raised a genuine issue of material fact. *See* Fed.R.Civ.P. 56(c); *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552–53. However, even if the Court were to find merit in plaintiff's claims, application of the appropriate statute of limitations would nonetheless render the action time-barred, and as to this issue the Court finds that there is no genuine issue of material fact. *Id.* Moreover, the equitable doctrine of laches would also stand as a time-bar in this case.

Based on these rulings, the Court need not take a position on the further defenses raised by defendant and the State, namely, that plaintiff has failed to join necessary and indispensable parties, pursuant to Rule 19 of the Federal Rules of Civil Procedure, and that the defendant has acquired title to Robins Island based on adverse possession. *See* Defendant's Memo at 28. Rather, for the reasons stated above the Court finds that defendant and the State have carried their burdens and shown the absence of a genuine issue of material fact sufficient to

award them summary judgment. Fed.R. Civ.P. 56(c); *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552–53; *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir.1987). Accordingly, plaintiff's motion for summary judgment is denied and defendant's and the State's motions for summary judgment are granted. Consequently, the complaint is dismissed; the Clerk of the Court is directed to close the file in this case.

SO ORDERED.

SUPREME COURT OF THE UNITED STATES

NO. A-94

Robins Island Preservation Fund, Inc,

Petitioner

v.

Southold Development Corporation

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 5th, 1992.

/s/ Clarence Thomas
Associate Justice of the Supreme
Court of the United States

Dated this 3rd
day of August, 1992.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of June, one thousand nine hundred and ninety-two.

ROBINS ISLAND PRESERVATION FUND, INC.,
Plaintiff-Appellant,

v.

SOUTHOLD DEVELOPMENT CORPORATION,
Defendant-Appellee.

v.

SOUTHOLD DEVELOPMENT CORPORATION,
Third-Party-Plaintiff

v.

STATE OF NEW YORK,
Third-Party-Defendant

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellant, Robins Island Preservation Fund, Inc.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH, CLERK

Docket No.: 91-7490 FILED JUNE 15, 1992

The 1783 Treaty of Peace,
Articles 3-6 included herein

(8 Stat. 54 and 80)

Article 3d

It is agreed that the People of the United States shall continue to enjoy unmolested the Right to take Fish of every Kind on the Grand Bank, and on all the other Banks of New-foundland, also in the Gulph of Saint Lawrence and at all other Places in the Sea, where the Inhabitants of both Countries used at any time heretofore to fish. And also that the Inhabitants of the United States shall have Liberty to take Fish of every Kind on such Part of the Coast of New-foundland as British Fishermen shall use, (but not to dry or cure the same on that Island) and also on the Coasts Bays & Creeks of all other of his Britannic Majesty's Dominions in America, and that the American Fishermen shall have Liberty to dry and cure Fish in any of the unsettled Bays, Harbours and Creeks of Nova Scotia, Magdalen Islands and Labrador, so long as the same shall remain unsettled, but so

APP 82

Draft 3 of the 1783 Treaty of Peace, Articles 5 And 6 included herein

(6 Wharton, *The Revolutionary Diplomatic Correspondence of the United States*, p. 76)

ARTICLE V. It is agreed that restitution shall be made of all estates, rights, and properties in America which have been confiscated during the war.

ARTICLE VI. There shall be a full and entire amnesty of all acts and offenses which have been, or may be supposed to have been, committed on either side, by reason of the war, and in the course thereof, and no one shall hereafter suffer in life or person, or be deprived of his property, for the part he may have taken therein. All persons in confinement on that account shall immediately, on the ratification of the treaty in America, be set at liberty; all prosecutions which may be depending in consequence of any of the said offenses shall cease, and no fresh prosecutions shall at any time hereafter be commenced thereupon.

Alternate Draft 3 of The 1783 Treaty Of Peace, Art. 5, Supplemental Modification, included herein

(C.O. 5/8, Library of Congress, MSS. Div., Accession No. 11467, Reel 5, pp. 358-359; see also C.R. 47, Exh. 13)

It is agreed that all persons who have any interest in confiscated lands either by debts or marriage settlements shall meet with no lawfull impediment in the prosecution of their just rights.

The 1794 Treaty of Amity, Commerce, and Navigation (Jay Treaty), 8 Stat.116. Art. 9 included herein

It is agreed, that British subjects who now hold Lands in the Territories of the United States, and American Citizens who now hold Lands in the Dominions of His Majesty, shall continue to hold them according to the nature and Tenure of their respective Estates and Titles therein, and may grant, Sell or Devise the same to whom they please, in like manner as if they were Natives; and that neither they nor their Heirs or assigns shall, so far as may respect the said Lands and the legal remedies incident thereto, be regarded as Aliens.

Constitutional provisions and statutes involved:

1. **The Supremacy Clause, Article 6, cl. 2, United States Constitution.**

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Act of Attainder, enacted October 22, 1779, Laws of New York, 3 Sess., c. 25. Preamble, sections 1, 2, 23, and 25 (part) included herein

An ACT *for the Forfeiture & Sale of the Estates of Persons who have adhered to the Enemies of this State, and for declaring the Sovereignty of the People of this State, in Respect to all Property within the same.*

Passed 22d October, 1779.

WHEREAS during the present unjust and cruel War, waged by the King of *Great-Britain*, against this State, and the other United States of *America*, divers Persons holding or claiming Property within this State, have voluntarily been adherent to the said King, his Fleets and Armies, Enemies to this State, and the said other United

States, with Intent to subvert the Government and Liberties of this State, and the said other United States, and to bring the same in Subjection to the Crown of *Great-Britain;* by Reason whereof, the said Persons have severally justly forfeited all Right to the Protection of this State, and to the Benefit of the Laws under which such Property is held or claimed: *And whereas* the public Justice and Safety of this State absolutely require, that the most notorious Offenders should be immediately hereby convicted and attainted of the Offence aforesaid, in order to work a Forfeiture of their respective Estates, and vest the same in the People of this State: *And whereas* the Constitution of this State, hath authorised the Legislature to pass Acts of Attainder for Crimes committed before the Termination of the present War:

I. *Be it therefore Enacted by the People of the State of* New-York, *represented in Senate and Assembly, and it is hereby Enacted by the Authority of the same,* That John Murray, Earl of *Dunmore,* formerly Governor of the Colony of *New-York;* William Tryon, Esq; late Governor of the said Colony; John Watts, Oliver De Lancey, Hugh Wallace, Henry White, John Harris Cruger, William Axtell and Roger Morris, Esquires, late Members of the Council of the said Colony; George Duncan Ludlow, and Thomas Jones, late Justices of the Supreme Court of the said Colony; John Tabor Kempe, late Attorney-General of the said Colony; William Bayard, Robert Bayard, and James DeLancey, now or late of the City of *New-York,* Esquires: David Matthews, late Mayor of the said City; James Jauncey, George Folliot, Thomas White, William McAdam, Isaac Low, Miles Sherbrook, Alexander Wallace and John Wetherhead, now or late of the said City, Merchants: Charles Inglis, of the said City, Clerk, and Margaret his Wife; Sir John Johnson, late of the County of *Tryon,* Knight and Baronet; Guy Johnson, Daniel Claus, and John Butler, now or late of the said County, Esquires; and John Joost Herkemer, now or late of the said County, Yeoman;

Frederick Philipse, and James De Lancey, now or late of the County of *Westchester*, Esquires; Frederick Philipse, (Son of Frederick) now or late of the said County, Gentleman; David Colden, Daniel Kissam, the Elder, and Gabriel Ludlow, now or late of *Queen's* County, Esquires; Philip Skeene, now or late of the County of *Charlotte*, Esq; & Andrew P. Skeene, Son of the said Philip Skeene, late of *Charlotte* County; Benjamin Seaman, and Christopher Billop, now or late of the County of *Richmond*, Esquires; Beverly Robinson, Beverly Robinson, the Younger, and Malcom Morrison, now or late of the County of *Dutchess*, Esquires; John Kane, now or late of the said County, Gentleman; Abraham C. Cuyler, now or late of the County of *Albany*, Esq; Robert Leake, Edward Jessup, and Ebenezer Jessup, now or late of the said County, Gentlemen; and Peter DuBois, and Thomas H. Barclay, now or late of the County of *Ulster*, Esquires; Susannah Robinson, Wife to the said Beverly Robinson, and Mary Morris, Wife to the said Roger Morris; John Rapalje, of *King's* County, Esq; George Muirson, Richard Floyd, and Parker Wickham, of *Suffolk* County, Esquires; Henry Lloyd, the Elder, late of the State of *Massachusetts-Bay*, Merchant; and Sir Henry Clinton, Knight, be, and each of them are hereby severally declared to be, *Ipso Facto*, convicted and attainted of the Offence aforesaid; and that all and singular the Estate, both real and personal, held or claimed by them the said Persons severally and respectively, whether in Possession, Reversion or Remainder, within this State, on the Day of the passing of this Act, shall be, and hereby is declared to be forfeited to, and vested in the People of this State.

II. *And be it further Enacted by the Authority aforesaid*, That the said several Persons herein before particularly named, shall be, and hereby are declared to be forever banished from this State; and each and every of them, who shall at any Time hereafter be found in any Part of this State, shall be, and are hereby adjudged and declared

guilty of Felony, and shall suffer Death as in Cases of Felony, without Benefit of Clergy.

XXV. *And be it further Enacted by the Authority aforesaid,* That the Forms of the several Proceedings to be had in Pursuance of this Act, and of the Deeds or Conveyances to be executed by the Commissioners to be appointed in Pursuance of this Act, shall be as follows, *that is to say,* . . . .

Form of the Conveyance from the Commiffioners.

"THIS INDENTURE, made the Day of in the Year of the Independence of the State of *New-York*, and in the Year of our Lord between Esquires, Commissioners of Forfeitures, for the District, appointed in Pursuance of an Act of the Legislature of the said State, entitled, *An Act for the Forfeiture and Sale of the Estates of Persons who have adhered to the Enemies of this State, and for declaring the Sovereignty of the People of this State, in Respect to all Property within the same,*" of the one Part, and of the other Part; Witnesseth That the said Commissioners, by Virtue of the Power and Authority to them, in and by the said Act granted, and for, and in Consideration of the Sum of by the said paid into the Treasury of the said State, have granted, bargained, sold, enfeoffed and confirmed; and by these Presents do grant, bargain, sell, enfeoff and confirm, unto the said and Heirs and Assigns, all *(here describe the Lands or Tenements to be conveyed)* and all and singular the Estate, Right, Title and Interest, whether in Possession, Reversion, or Remainder of, in or to the said Premises, which, in Consequence of any Conviction or Attainder, is become forfeited, attached, or vested in, or to the People of the said State. TO HAVE AND TO HOLD, all and singular the said Premises, hereby granted, bargained, sold, enfeoffed and confirmed, with the Appurtenances, unto the said and Heirs and Assigns, to the only proper Use and Behoof of the

said and Heirs and Assigns forever. In Witness whereof, the said Parties to these Presents have hereunto interchangeably set their Hands and Seals, the Day and Year first above written."

Act to Abolish Entails, enacted July 12, 1782, Laws of New York, 6 Sess., c. 2. Section 1 included herein

AN ACT to abolish entails, to confirm conveyances by tenants in tail, to distribute estates real of intestates, to remedy defective conveyances to joint tenants, and directing the mode of such conveyances in future.

I. *Be it enacted by the People of the State of New York, represented inSenate and Assembly, and it is hereby enacted by the authority of the same,* That in all cases, wherein any person or persons would, if this law had not been made, had been seized in fee-tail, of any lands tenements hereditaments, such person or persons shall, in future, be deemed to be seized of the same in fee-simple.

And further, That where any lands tenements or hereditaments, shall heretofore have been devised, granted, or otherwise conveyed, by a tenant in tail, and

the person, to whom such devise, grant, or other conveyance shall have been made, his or her heirs or assigns, shall, from the time such devise took effect, or from the time such grant or other conveyance was made, to the day of the passing of this act, been in the uninterrupted possession of such lands, tenements or hereditaments, and claiming and holding the same under such devise, grant, or other conveyance, then such grant, devise, or other conveyance, shall be deemed as good legal and effectual to all intents, as if such tenant in tail had, at the time of the making of such devise, grant, or other conveyance, been seized of such lands, tenements or hereditaments in fee simple, any law to the contrary hereof notwithstanding.

Act of February 20, 1790, recognizing property interest of David Richard Floyd Jones in confiscated estate.
Laws of New York, 13 Sess., c. 10.

AN ACT to vest in David Richard Floyd Jones the estate therein mentioned.

WHEREAS David Jones late of Fort Neck in Queens county Long Island deceased, being at the

soon as the same or either of them shall be settled, it shall not be lawful for the said Fishermen to dry or cure Fish at such Settlement without a previous Agreement for that Purpose with the Inhabitants, Proprietors or Possessors of the Ground.

ARTICLE 4th

It is agreed that Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bonâ fide Debts heretofore contracted.

ARTICLE 5th

It is agreed that the Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the Restitution of all Estates, Rights and Properties, which have been confiscated belonging to real British Subjects; and also of the Estates, Rights and Properties of Persons resident in Districts in the Possession of his Majesty's Arms and who have not borne Arms against the said United States: And that Persons of any other Descrip-

tion shall have free Liberty to go to any Part or Parts of any of the thirteen United States and therein to remain twelve months unmolested in their Endeavours to obtain the Restitution of such of their Estates, Rights and Properties as may have been confiscated; and that Congress shall also earnestly recommend to the several States a Reconsideration and Revision of all Acts or Laws regarding the Premises, so as to render the said Laws or Acts perfectly consistent not only with Justice and Equity but with that Spirit of Conciliation which on the return of the Blessings of Peace should universally prevail. And that Congress shall also earnestly recommend to the several States, that the Estates, Rights and Properties, of such last mentioned Persons shall be restored to them, they refunding to any Persons who may be now in Possession the bonâ fide price (where any has been given) which such Persons may have paid on purchasing any of the said Lands, Rights or Properties since the Confiscation.

And it is agreed that all Persons who have any Interest in confiscated Lands, either by Debts, marriage Settlements, or otherwise, shall meet with no lawful Impediment in the Prosecution of their just Rights.

APP 84

Article 6th

That there shall be no future Confiscations made nor any Prosecutions commenced against any Person or Persons for, or by Reason of, the Part which he or they may have taken in the present War, and that no Person shall on that Account suffer any future Loss or Damage either in his Person, Liberty or Property; and that those who may be in Confinement on such Charges at the time of the Ratification of the Treaty in America, shall be immediately set at Liberty, and the Prosecutions so commenced be discontinued.

APP 85

time of his death seized of an estate of inheritance in the county aforesaid did, by his last will and testament devise the same to the use of his son Thomas Jones for life with several contingent remainders over, *And whereas* the interest of the said Thomas Jones in the same estate by his attainder became forfeited to and vested in the people of this State And whereas David Richard Floyd Jones is the next remainder man to whom the estate is limited upon the death of the said Thomas Jones *And whereas* it is represented to the legislature that the premises aforesaid are much impaired to the great injury of those in remainder.

Be it enacted by the People of the State of New York, represented in Senate and Assembly, and it is hereby enacted by the authority of the same, That all the right title and interest of the people of this State of in and to the estate aforesaid by virtue of the attainder aforesaid be and the same is hereby vested in the said David Richard Floyd Jones and his legal representatives for and during the natural life of the said Thomas Jones any law usage or custom to the

contrary notwithstanding And the said David Richard Floyd Jones is hereby released and for ever discharged off and from all arrearages of rent from him due on the estate aforesaid.

The Act of Compromise,
enacted December 10, 1796.
Laws of Virginia, c. 14

An ACT *concerning certain Lands lying in the Northern Neck*

WHEREAS sundry appropriations of lands supposed to lie within the Northern Neck, have been made in virtue of land warrants issued under the authority of the commonwealth of Virginia, which lands are claimed under Denny Fairfax, who was a devisee of Thomas Lord Fairfax, late proprietor of the said Northern Neck: *And whereas*, the commonwealth has asserted a right to the said estate so devised to the said Denny Fairfax, he being an alien, which several claims remain undecided and are now pending in the court of appeals of this commonwealth and in the supreme court of the United States, and a proposition made by a resolution of the general assembly, in consequence

of a petition from the counties of Hampshire, Hardy, and Shenandoah, for an accomodation of the said pending controversies, in the words following: "*Resolved,* That in case the devisees of Lord Fairfax, or those claiming under them, will relinguish all claim to lands supposed to lie within the Northern Neck, which were waste and unappropriated at the time of the death of Lord Fairfax, that it would be adviseable for this commonwealth to relinquish all claim to any lands specifically appropropiated by the said Lord Fairfax to his own use either by deed or actual survey," having been accepted by a letter in the words and figures following: -- "Richmond, November 24th, 1796, Sir, being one of the purchasers of the lands of Mr. Fairfax, and authorised to act for them all, I have considered the resolution of the general assembly on the petition of sundry inhabitants of the counties of Hampshire, Hardy, and Shenandoah, and have determined to accede to the proposition it contains. So soon as the conveyance shall be transmitted to me from Mr. Fairfax, deeds extinguishing his title to the

waste and unappropriated lands in the Northern Neck shall be executed, provided an act passes during this session, confirming, on the execution of such deeds, the title of those claiming under Mr. Fairfax, to lands specifically appropriated and reserved by the late Thomas Lord Fairfax, or his ancestors for his or their use. I remain Sir, with much respect and esteem, your obedient servant, John Marshall. The Honorable, the Speaker of the House of Delegates." For carrying the said agreement and accommodation into effect:

SECTION 1. *BE it enacted,* That upon the execution of a deed by Denny Fairfax, or those having title under him or the said Thomas Lord Fairfax, extinguishing on behalf of this commonwealth, his or their title to all lands lying within the Northern Neck, which, by the terms of the above recited proposal and agreement, he or they are bound to relinquish, all claim right and title of the commonwealth of Virginia in or to any lands lying in the said Northern Neck, which is by the terms of the said proposal and agreement to be relinguished, shall from thenceforth be extinquished, null, and void;

and the said Denny Fairfax, or those claiming under him, and his or their heirs, shall hold the same, as if he the said Denny had been a native citizen of this commonwealth, and as if no escheat or forfeiture thereof had ever taken place; any law to the contrary notwithstanding.

SAVING to every person, other than this commonwealth, and Denny Fairfax, and those claiming under him, any right or title, in law or equity, which he or they may have to the lands in the said Northern Neck of Virginia, or any part thereof.

The Act of April 5, 1832, Laws of New York, 55 Sess., c. 86; section 1 included herein

AN ACT *authorising and directing the final settlement of the claims of John Jacob Astor against this State.*

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

1. The final decision against the tenants, and in favor of John Jacob Astor, in three of the five suits directed by the act entitled "An act to extinguish the claim of John Jacob Astor and others, and to quiet the possession of certain lands in the counties of Putnam and Dutchess," passed April 16, 1827, to be prosecuted to judgment in the circuit court of the southern district of New-York, and to be presented by writs of error to the supreme court of the United States for review and final determination, shall be considered a compliance in that particular, with the intent and meaning of the said act; and the comptroller, upon the proper evidence being adduced to him of such final decision in favor of the said John Jacob Astor and those claiming undetr him, in any three of the said suits, may settle and pay the said claim in the manner directed by the said act, without requiring any proceedings in the two remaining suits.